Clifford Johnson,
Polya Hall,
Stanford,
CA 94305.
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Plaintiff *pro se*.

D-R: 56

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Clifford J. Johnson,

Plaintiff,

vs.

Gen. John T. Chain, Commander In Chief, Lt. Gen. Richard A. Burpee, Commander, 1st Lt. Dale Curington, Capt. Derek Avance, 2nd Lt. Steven Bacs, 2nd Lt. Richard Schoonmaker, 2nd Lt. Richard Murphy, Commander Phillip Moore, 2nd Lt. Steven Moore, Col. Edward Burchfield, and all in the Strategic Air Command's chain of command for Minuteman/MX launch,

Defendants.

(FU; Esc; and

No. C 89 2026 5 SW

FIRST AMENDED COMPLAINT IN EQUITY FOR A FINDING OF STANDING AND FOR CLARIFICATION OF A PRIOR JUDGMENT

Suits like this
on 1) Seeing Agents?
2) Covert Ops?!
and Bills

Problem: Preemptive War (Anticipatory Self-Defense) based on Uncertain Warning launched

(uncertain warning is not operationally falsifiable in an objective sense, unless it specifies certainty, impossibility, or "near-certainty/impos

1. Jurisdiction. Plaintiff invokes the equitable jurisdiction of this court on the grounds that the dismissal of a prior case did not provide him with a fair opportunity to fully litigate his claim of standing, which he seeks to remedy by this action. *Noonan v. Lee,* (1862) 2 Black 499, 17 L.Ed. 278. Because the unusual remedy of a finding of standing is purely equitable relief, this invocation is necessary, proper, and sufficient. 27 *Am.Jur.* 2d, *Equity §§ 7,12,120.*

2. Plaintiff. Plaintiff Clifford J. Johnson has been a British resident of San Francisco, California since 1976. His professional address is given in the above caption. Plaintiff is primarily interested in developing a properly complete record with respect to a claim of standing which was ruled insufficient *only on appeal* in a prior case. This foreclosed extensive *factual* additions which meet the deficiencies specified as grounds for lack of standing.

3. Defendants. This complaint concerns all members of the Strategic Air Command's chain of command for accomplishing the launch of Minuteman and MX nuclear missiles, that is, all whose responsibilities contingently include issuing or relaying or finally executing orders to launch Minuteman or MX missiles, from the named Commander in Chief down to the crews whose job is to turn the keys that launch the missiles. It is against this set of people that the Plaintiff's claim of standing now presses, and so they are real parties in interest. The named Defendants are based at F. E. Warren Air Force Base, Cheyenne, Wyoming 82003, except for: General Chain, who is based at Offut Air Force Base, Nebraska 68113; Lt. General Burpee, who is based at March Air Force Base, California 92518; and Edward Burchfield, who is based at Malmstrom Air Force Base, Nebraska

59402. They include commanders of Minuteman/MX missile wings, and missile launch crews. The allegations below, especially re nondiscretionary function, vary according to rank. This suit is brought against them severally, both in their official capacities and as individuals.

4. Venue. Regular military procedure provides for representation by local government attorneys of all the widely dispersed Defendants, notwithstanding their personal responsibilities. *Military Law Review* (1986) Vol.113. *Personal Liability, Representation,* at 158-9. Venue in the Northern District of California is appropriate because the allegedly threatened environs of Sunnyvale's Satellite Control Facility is within its boundary. Further, this suit asks for a clarification of a prior judgment issued in a related case by the Honorable Spencer Williams, who is now a judge sitting in San Jose.

STATEMENT OF CASE

As detailed in Plaintiff's Declaration (Exhibit B filed herewith):

5. The at issue prior case. This is the third complaint filed by the Plaintiff which concerns the risk of accidental nuclear launch. The at issue second case is *Johnson v. Weinberger,* C-86-3334-SW, filed June 17, 1986. That complaint, comprising Exhibit F filed herewith, was finally dismissed by this trial court by order filed June 29, 1987, comprising Exhibit H filed herewith, as a matter of law, and under the political question doctrine. On appeal, CA-87-2566, the argument naturally focussed on the political question issue. However, by published opinion (hereafter "the opinion") filed June 27, 1988, comprising Exhibit J filed herewith, the dismissal was affirmed on the ground that the Plaintiff had insufficiently alleged standing, expressly without reaching the political question issue.

6. Plaintiff had no opportunity to meet the leading ground for the

finding of lack of standing, namely, that the Defendant was overly remote. The leading ground for the finding of a lack of standing, as described below, was that the injury was "speculative" because it attacked the "policy" of the Secretary of Defense, rather than the actions of those who directly threaten to launch missiles. This argument had never been made before, and so the Plaintiff had no opportunity to meet it.

7. Plaintiff had no full and fair opportunity to meet the concluding ground for the finding of lack of standing, namely, that he had an alternative remedy through representation. The final ground in the opinion for finding of a lack of standing is that the Plaintiff would more appropriately address his complaint to the "representative" branches. This reflected the ground stated by two of the three justices at the hearing of the appeal, namely, that the Plaintiff lacked standing because his due process remedy was his vote. Again, this was a novel argument, which the Plaintiff had no meaningful opportunity to meet.

8. Plaintiff was diligent, and was harmed by his lack of opportunity to meet the various factual findings re his lack of standing. Likewise, the Plaintiff had no meaningful opportunity to meet other objections to his standing stated in the opinion, such as his failure to allege "aesthetic" harm (which was yet another wholly novel ground), or demographic disfavor in the degree of risk. In sum, the Plaintiff was duly diligent, but the case was dismissed without the Plaintiff having had a fair and full opportunity to introduce further *factual* allegations establishing his standing. For instance, in compliance with an express instruction of the trial court, given on the face of Exhibit G filed herewith, the Plaintiff had curtailed his arguments re standing to a mere page, *and this argument was not judged insufficient in the trial*

court. When the court of appeal differently found that the Plaintiff lacked standing, it did not consider substantial new facts which could have been alleged and which squarely meet every objection raised in the opinion.

9. The Proposed Complaint. These new facts are alleged in the Proposed Complaint for Declaratory Relief, comprising Exhibit A filed herewith. In framing the Proposed Complaint, which he hopes, ultimately, to file as an original action, the Plaintiff has fully complied with the opinion of the court of appeal. Because the prior, regularly terse complaints were both dismissed on appeal for failure to include seemingly superfluous factual material that there was no meaningful opportunity to add, the Plaintiff has this time drafted what he believes is a factually final Proposed Complaint. The extraordinary length is warranted for this reason, and also to include many new legal contentions that touch upon standing. It is natural that reckless endangerment of the Plaintiff and of countless millions more would violate prominent elements of constitutional, statutory, military, international, and common law, all of which are cited.

10. New factual allegations. The Proposed Complaint is significantly new in subject matter, and sues new Defendants based on substantively new primary legal theories, and includes *six or seven* new secondary legal theories, based on wholly new facts, which separately establish standing. The opinion identified a number of factual defects re standing which the Plaintiff could have corrected by rather trivial factual additions, if only he had been given the opportunity to do so. For example, he could have alleged that he could not vote, had no congressperson to petition for legislative redress, worked in an area of especially high risk, and suffered a special *objective* apprehension.

11. By far the most important new fact: different Defendants. The opinion *at the outset* found the injury of risk "speculative," because it was inferred from the "policy" of the Defendant Secretary of Defense. This perception colored the entire opinion, and so correcting the speculative defect alone could possibly give rise to standing. For example, the opinion went on to represent that the Plaintiff had alleged "mere interest in a problem," rather than that his very life was at immediate risk. As sole authority, the opinion cited a case against government officials in which injury was found "speculative" *only* because the rewarded agents of the government officials, who *directly* caused the injury, were not named as Defendants. In full accord with this authority, the Proposed Complaint sues the directly responsible military commanders, rather than the Secretary of Defense, alleging that their *agreed instructions* re nuclear launch, which were not at issue in the prior case, are *recklessly and inherently dangerous*.

12. Why a return to the trial court is warranted. The obvious bulk and complexity of the factual changes precluded their introduction, by extraordinary motion, in the court of appeal. (Incidentally, the Plaintiff was also handicapped by the disappearance of the tape of the court of appeal hearing.) Moreover, *Plaintiff does not challenge the court of appeal's finding hereby, but accepts it as the starting point for the Proposed Complaint.* For these reasons, a return to the trial court is the proper step.

13. Why the equitable relief is appropriate. However, the Plaintiff must also be respectful of this trial court's prior dismissal under the political question doctrine, especially in view of the fact that it has already drawn the same conclusion *twice* (at Exhibits D and H filed herewith). The Plaintiff's opinion is that the language of the later dismissal, especially by use of the

unqualified word "executive." which includes the military. encompasses the new allegations. despite the radical change in Defendants. Rather than impertinently disregarding this court's political question dismissal by simply filing the Proposed Complaint. the Plaintiff respectfully asks that this court go no further than: **(a)** find that the Proposed Complaint sufficiently alleges standing: and. if it does. **(b)** summarily confirm that the dismissal under the political question doctrine nevertheless acts as a bar. or to otherwise clarify the application of that judgment. In this event. the Plaintiff will be able. and intends. to ask the court of appeal to review the new factual allegations. Even if unsuccessful, Plaintiff will then have fulfilled his obligation to exhaust his remedies in the lower courts before petitioning the highest court.

PRAYER

WHEREFORE, Plaintiff prays that this court:

(i) issue a finding that. in the Proposed Complaint, the Plaintiff has sufficiently alleged standing:

(ii) confirm that the prior judgment in case C-86-3334 SW, filed June 29, 1987, bars the filing of the Proposed Complaint under the political question doctrine;

(iii) grant such other or further relief as this court deems fit and proper.

SIGNED C. Johnson DATED 7/3/89

Clifford Johnson.
Plaintiff *pro se.*

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Plaintiff *pro se*.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Clifford J. Johnson,

Plaintiff,

vs.

General John Chain, etc., et al.,

Defendants.

No. C 89 2026 5 SW

TABLE OF EXHIBITS TO THE COMPLAINT IN EQUITY

Clifford Johnson,
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Defendants.

No. C 89 2026 5 SW

PROPOSED COMPLAINT FOR DECLARATORY RELIEF

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IV. FIRST COUNT - POWER TO DECLARE WAR

In peacetime, Defendants' duty is to disobey an exclusively presidential launch order or EAM, because they know or plainly should know that it represents a likely first act of war.

TABLE OF CITATIONS

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OTHER CITATIONS

I. BASIC ALLEGATIONS

A. Constitutional, statutory, and international jurisdictions.

1. To lessen concrete, particular, present, and continuing risks to his life, and in fulfillment of his obligations to complain of crimes against the peace that he is informed of, Plaintiff invokes the jurisdiction of this court under the Constitution of the United States at Article III § 2, which mandates that "The judicial power shall extend to all Cases or Controversies . . . arising under this Constitution, the Laws of the United States, and Treaties . . .; to controversies to which the United States shall be a party." Declaratory relief is sought, as provided for by 28 U.S.C. § 2201 and F. R. Civil P., Rule 57.

2. Plaintiff brings this action: **(a)** as a constitutional tort against the Defendants as individuals, under the due process clause of the Fifth Amendment to the Constitution of the United States, on the grounds that Defendants' conduct violates constitutional, statutory, and international law, and said risks are a consequent threat of personal harm, and are an unfair anticipatory deprivation without a possibility of just compensation, and presently infringe upon his right to quietly enjoy his life and property; and, separately, **(b)** as a common-law tort against the Defendants acting in their official capacities, on the grounds that said risks or threat are *per se* here-and-now injuries that are caused recklessly and otherwise unlawfully, and so constitute tortious conduct *(Restatement (2nd) of Torts* (1965) §§ 7,282-302,500-03), which is actionable under both 28 U.S.C. § 1331 (Federal Tort Claims Act) and § 1350 (Alien Tort Claims Act).

3. Further and separately, Plaintiff brings this action both: **(a)** under the Martens clause of the Hague Convention Respecting the Laws and Customs of War on Land, (1907) 36 Stat. 2277, T.S. No. 539; and **(b)** under Article 6 of the Treaty of London (1945) 59 Stat. 1544, 82 U.N.T.S. 279. The United States is a signatory to both of these

treaties (and also to the other Hague Conventions, and to the United Nations Charter, and to the Geneva Conventions, and to the Resolution on the Definition of Aggression, cited below). These treaties are thus part of "the supreme Law of the Land" under the mandate of Article VI Clause 2 of the Constitution of the United States. As detailed below, they grant jurisdiction and impose a duty upon the federal courts to hear a complaint of crimes against the peace credibly made by a qualified Plaintiff, particularly when that Plaintiff has no other formal recourse of complaint, and regardless of whether any personal injury is alleged.

4. Re the Third Count and the Fourth Count only, jurisdiction also arises under Article IV § 4 Clause 1 of the Constitution, which requires that the judiciary "guarantee" a republican form of government. Plaintiff's constitutional right to reside under the natural protections of a republican form of government is allegedly violated in those counts.

B. Plaintiff.

5. Plaintiff Clifford J. Johnson was born in 1948, in London, England. In 1969 he obtained a first-class bachelor of arts in mathematics, and in 1970 a master of science degree in Operations Research,[1] from Oxford University, England. From 1970-1972 Plaintiff studied Operations Research at Stanford University, and statistics at U.C. Berkeley, as a Harkness Fellow, which is a competitive award made by the Commonwealth Fund of New York. From 1972-1975, Plaintiff taught statistics in the Operations Research department of Sussex University, England, where he obtained a doctorate for a project he completed as a consultant for the Organization for Economic Co-Operation and Development in Paris, France.

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[1] Operations Research is a quantitative discipline that includes military planning and decisionmaking. Its origins are associated with the operation of radars in England in the early days of World War II.

6. Plaintiff has been a British resident of San Francisco, California since 1976. From 1977-1980, Plaintiff was employed as a mainframe computer capacity planner by the Bank of America, in San Francisco. He has been employed as a mainframe computer capacity manager by Stanford University, California, since 1981. Plaintiff is presently President of the Palo Alto chapter of Computer Professionals for Social Responsibility, a national organization headquartered in Palo Alto, California, which has endorsed his litigation as "ethically compelling" (Attachment A herewith).

C. Defendants.

7. Plaintiff is presently unaware of the personal identities and total number of Defendants, but unambiguously defines them to be all members of the Strategic Air Command's chain of command for accomplishing the launch of Minuteman and MX nuclear missiles. In other words, the Defendants comprise all members of the Strategic Air Command whose responsibilities contingently include issuing or relaying or finally executing orders to launch Minuteman or MX missiles.[2] The Commander In Chief of the Strategic Air Command (hereafter "CINCSAC") is the Defendant holding highest military rank, and he is the commander of all other Defendants. Minuteman and MX missile combat crews (including commanders and deputies) comprise the large subgroup of Defendants holding the lowest military rank. In due course, the Plaintiff will amend this complaint to name further Defendants, if it transpires that the already named Defendants do not include a representative of each command level.

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[2] A proposed "rail garrison" basing of MX missiles is not expected to affect this definition of the Defendants. For example, Secretary of the Air Force Aldridge promised that the "Soviets could never be assured that their bolt out of the blue attack would be successful because we could launch right out of the garrison, if we have to." Senate Armed Services Committee, DOD Appropriations FY 1988, pt.1 at 119. Neither the forthcoming (by 1990) Trident II chain of command, nor the more futuristic Midgetman chain of command, are implicated in this complaint; but see fn.6 below for reservations.

8. The First Count and the Third Count are against all Defendants. The Second Count and the Fourth Count are against only CINCSAC and his delegates and deputies as specified thereunder.

D. The Single Integrated Operational Plan.

9. The launch of Minuteman and MX missiles is provided for by the "Single Integrated Operational Plan" (hereafter "SIOP"). which is prepared by CINCSAC under his second-hat Directorship of the multiservice Joint Strategic Target Planning Staff. The SIOP is substantially an Operations Research product. comprising a huge, computerized set of plans designed and implemented for the execution of a menu of labelled "options," one of which would be chosen (in advertised cases, by the President, from a many-paged "black book") in the event of a decision to launch an intercontinental ballistic missile nuclear attack on the Soviet Union. Each SIOP option includes a table of targets and launch times for the many individual nuclear warheads in all the services that would be launched if execution of that option were ordered.

10. Detailed decisions to adopt or support new SIOP options are taken in secret, but it is no secret that they are taken. or that Operations Research techniques provide a supposedly scientific standard for review of them. The nature of the SIOP options now in effect is public knowledge to the general extent that is alleged in the First Count, the Second Count, and the Third Count; the Fourth Count, with more than mere speculation, goes further. A SIOP option, having been adopted, has its targeting and other parameters optimized, in terms of balance-of-force ("force correlation") indices that are valued by the military, to respond to prescribed military "scenarios."

11. The SIOP is much more than the sum of its target tables. It is a perpetually active global set of programmatic procedures that assure the capacity to execute any SIOP option, as soon as possible and at any time, without requiring two-way communication between recipients of launch orders and their commanders. The SIOP

is changed like computer software, with component updates distributed via data networks, and with major new versions taking effect at the same awaited moment the world over.

E. Defendants' challenged agreements to standing orders.

12. At issue herein are "preemption" and "launch under attack" SIOP options, respectively defined in paragraphs 35 and 38 below.[3] The dynamic support of the preemption and launch under attack options operates as dangerously in fact, and as recklessly at law, as the far lesser criminal offence of unauthorized pointing of a loaded gun. This is because both options depend upon standing orders (and subdelegations) which require that Defendants be ready to launch missiles *at any moment*, on exclusively executive demand. This is *inherently* dangerous.

13. It is possible in several ways to impose a procedural and/or physical barrier precluding such quick-launch; but Plaintiff does not ask the court to decide what correction to apply. Directly, Plaintiff challenges only the Defendants' agreements to the standing orders (and subdelegations) that are now in effect. A victory for the Plaintiff will impliedly require only that the Defendants agree to new instructions that conform with the declaration of the court.

14. Instructions issued to military forces must be lawful under Article 1 of The Hague Convention Respecting the Laws and Customs of War on Land, *supra*. Under domestic law also, standing orders and subdelegations are justiciable. Indeed, case-law regarding the lawfulness of military orders, as perceived by recipients, is extensively developed on account of 10 U.S.C. § 892, which expressly does not require obedience to unlawful orders. A pertinent example of the justiciability of delegations, in a non-

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[3] This complaint defines some terms whose precise meanings vary in defense literature. Plaintiff's definitions are in line with most common usage, and he respectfully suggests that they be adhered to for the purposes of this action.

military case, is *Bowsher v. Synar*, (1986) 106 S.Ct. 3181, which firmly decided that realism controlled the legal analysis, notwithstanding superficial claims re the locus of responsibility for decisionmaking.

F. Outline of theory of case: Defendants' manifestly unlawful and reckless nuclear launch instructions particularly imperil Plaintiff, and in any case are of actionable public concern.

15. Through celebrated standing orders, which have persisted for some years, and which are projected by the Air Force as holding firm through the next decade, and which are challenged by the First Count, the Second Count, and the Third Count; and through similarly persistent, but secret, standing subdelegations, which are challenged *only* by the Fourth Count; the Defendants now operate Minuteman and MX missiles so that at any time the SIOP's preemption and launch under attack options could immediately be executed, without the consent of Congress, if, in the exclusive judgment of the executive branch, or, rather, if in the displays of its computers, an appropriate scenario seemed to have arisen.

16. As a consequence, there are three distinct risks of nuclear war being *commenced* unilaterally by the executive branch, or by its computers, as follows: **(a)** wilfully, by preemption on inevitably inconclusive warning of imminent Soviet launch; or **(b)** mistakenly,* by wilful launch under incorrectly "confirmed" attack; or **(c)** wholly unwilfully, e.g. by accidental completion of a test drill. Below, these factual possibilities are separately introduced, but at law (in paragraphs 62,63 and thereafter) they are generally joined as foreseeable follies, except that the Third Count treats them separately and the Fourth Count concentrates on launch under attack.

17. It is alleged that agreements to perform preemption and launch under attack orders are unlawful because of, *inter alia*, the *unilateral* nature of the implicated decision by the executive branch to engage in unlimited war, based on the prompting of inevitably inconclusive computerized information, and based on human reactions

* under expectations that are not (only) uncertain, but can be said to be mistaken; they may be the sort of expectations that would legitimate delegation. ("attack has occurred")

forced under great haste and stress. As a matter of law, computers govern the launch decisions, irrespective of essentially token "persons-in-the-loop". This amounts to an intolerable imposition of nonrepublican government by machine. Because the executive is engaging in this surrender of republican government, and because the Congress is incompetent to forcefully interpret the Constitution in this matter, it falls squarely upon the judiciary to act so as to guarantee a republican form of government.

18. Both preemption and launch under attack are implemented through said inherently dangerous standing orders to launch Minuteman and MX missiles immediately upon purportedly presidential demand, at any time, regardless of Congress. Such an order, received in peacetime, not only could be utterly accidental, which is officially disputed, but it certainly and officially could be a preemptive or launch under attack order, the former of which would be, and the latter of which would gravely risk being (and so at law counts as), an illegitimate initiation of unlimited war. Thus, even without the possibility of utterly accidental launch, such a launch order risks illegitimate initiation of all-out nuclear war.

19. However, preemption and launch under attack, and even the subcategories "launch on warning" and "launch on impact." defined below, could be treated separately, because their pertinent decisionmaking characteristics and degrees of risk could be construed as different at law. Accordingly, each count includes all lesser counts that would arise by restricting the allegations to any of these three possibilities.

20. In all cases, it is alleged that Defendants' agreed instructions presently, unfairly, and particularly injure Plaintiff by endangering his life and property, and by directly impairing his right to quiet enjoyment of them. Accordingly, the Plaintiff's Fifth Amendment due process rights, and his guarantee of republican governance, and his common-law right to be free of threat of imminent physical harm, are recklessly, which means criminally, violated by Defendants. As a resident alien, Plaintiff is subject

to military conscription and regular taxation, without representation. The basic threat of harm to his person, even without, and certainly with, the fact that he has no political recourse outside of court, establish a *prima facie* cause of action under the Fifth Amendment.

21. Plaintiff also suffers a higher risk than many other people, due to his proximity to top-priority nuclear targets, and he suffers a specially qualified, objective, nonspeculative apprehension of the unlawful and dangerous nuclear launch operations detailed below. Further, under the Hague Conventions (1907) and Treaty of London (1945), to which the United States is a signatory, and which are enacted statutes, Plaintiff's qualified knowledge of this most grave of risks, considered together with the requirements of public conscience and Plaintiff's co-opted participation through taxation in the support of Defendants' activities, respectively grant him "Martens clause" and "Treaty of London" standing, which does not depend upon personal injury but upon other personal qualifications.

22. Accordingly, Plaintiff seeks a judicial declaration that said standing orders and subdelegations are unlawful, and that the Defendants' various duties are to disobey, refuse, reject, and rescind them, and to revoke all agreements to them.

all this could be added to secrecy agreements.

II. DETAILED FACTUAL ALLEGATIONS

A. Launch orders or EAMs.

23. Launch times tabulated in the SIOP are relative to a universal time-zero called the "reference time." Each Minuteman and MX missile has associated computers in which are stored, for each SIOP option, the missile's launch time relative to the reference time (appropriately called the missile's "delay" time, which is zero for the missiles fired in the opening salvo), and each warhead's target co-ordinates (most Minuteman and all MX missiles have multiple independently targetable warheads). Thus, a general launch instruction needs to specify only the reference time and the SIOP option code. Each missile's associated hardware also stores a secret but infrequently changed "enabling code," and is configured so as to preclude launch unless the ultimate data-entered launch instruction sent to the missile contains the same enabling code.

24. Typically, an order to launch a number of nuclear missiles comprises an electronically transmitted sequence of only an estimated 250 bits ("0" or "1" values) of coded information called an "Emergency Action Message" (hereafter "EAM"). Typically, an EAM that orders the launch of Minuteman and/or MX missiles contains the following data elements: **(a)** the chosen SIOP option label; **(b)** the chosen reference time; **(c)** the current enabling code; and **(d)** the current "authentication code."

B. Authentication.

25. EAMs may be recieved via one or more digital electronic communications channel. Defendants are presently obligated to validate EAMs upon receipt by manually checking that their authentication codes fit a frequently changed secret formula or code over which they have custody. Under a so-called Rapid Execution and Combat Targeting (REACT) subcontract, Defendant CINCSAC is now planning to computerize this authetication process, thereby reducing the reaction times of

missile launch crews to a matter of seconds. The enabling and authentication codes are called "positive controls" that purportedly guarantee that an EAM received by a Defendant, and all ultimate launch instructions transmitted to each missile, have so-called "presidential" authorization.

26. No regular launch order or EAM contains data implying, let alone validating, congressional authorization or consent. *

27. Defendants have agreed to and are are presently under said standing orders (and missile combat crews are additionally under a peculiar pledge), to act immediately upon any EAM they receive at any time, *whenever it contains the correct authentication code*. Missile combat crews are required to be ready to receive and act on an EAM at any time. They frequently rehearse sudden quick-launch drills, and there are frequent "end-to-end" tests of mock EAMs. A missile's launch becomes irrevocable as soon as two separate two-person missile combat teams have "turned keys" on them.

Compare the way "neighbors" are hostage to the decisions of owners + choice of nuclear reactors, transport of toxic waste, values at Rhodes

C. Warning indicators.

28. Defendants continuously monitor computerized warning indicators that supposedly measure or assess near-term and imminent Soviet military threats to the United States. (Of course, Plaintiff does not challenge the propriety or value of this best-immediate intelligence; it is only its use by the Defendants that is at issue.) Said warning indicators are electronically computed in real-time from live databases representing the global political and military situation. Intelligence and information is constantly input to the databases from a large network of shared executive resources, involving other military commands, the State Department, the Central Intelligence Agency, the National Security Agency, the Defense Intelligence Agency, the United States Space Command, and their various agents and satellite-sensor constellations.

* This is perfectly possible for plans, actions, procedures ... (with Pres as agent, instrument, "referee"

D. Levels of alert.

29. When certain warning indicators exceed certain thresholds, CINCSAC and other Defendants are incited by alarms to take preplanned packages of alerting actions, such as dispersing strategic bombers, or even, in seemingly time-urgent cases, ordering missile combat crews to insert their launch keys into the launch locks in preparation for minimum response time execution of an imminently expected EAM. In general, all Defendants perform procedures fixed for their current alert level or "defense condition code" (hereafter "DEFCON"). Defendants may for cause set the alert level for their own command, provided that they maintain at least the level of alert required by their superiors.

30. The global Department of Defense DEFCON has an integer value from 1 to 5, the lower integers corresponding to higher levels of alert. The global DEFCON has the value 5 in peacetime, but said standing orders require that Defendants now perform on ever-ready alert, at DEFCON 4. This alert at all times assures the launch of any number of Minuteman and MX missiles within a few minutes of the launch decision being taken unilaterally by the executive branch of the government, on the urgent prompting of warning computers, or otherwise. In particular, missile combat crews are ready to complete launch drills within about two minutes of receiving an EAM, the first launches occurring within about one minute after receipt of the EAM. This is objectively, rather than pejoratively, characterized as the continuous operation of a nuclear "hair-trigger," for reasons that follow.

E. Inherently dangerous strategic warning and preemption.

31. Hereafter, a "strategic" warning is by definition a warning that the Soviet Union may be about to launch a nuclear attack upon the United States. Experts concur that strategic warning is *inherently* unreliable, and yet it tempts belief, for attempted surprise attack is of course historically common, yet is usually preceded by

various warning indicators. Nevertheless, spurious strategic warnings of all sorts are even more common, and whether a potential enemy really is about to launch an unannounced initial attack cannot be at all certain before the event. *Managing Nuclear Operations*, (1987) Brookings Institution, p.283; *Strategic Warning And General War: A Look At The Conceptual Issues*, (1979) RAND N-1180-1-AF; *Perception And Strategic Warning*, (1979) RAND N-1273-AF, 1979; *Surprise Attack*, (1982) Brookings Institution, by Betts, pp.4,5,229,246,247.

32. In any case, intentional nuclear attack by the Soviet Union on the United States is highly improbable on its face, even without said standing orders that threaten preemption and LUA, because of the catastrophic retaliation promised by the United States Navy's invulnerable nuclear attack submarines, *inter alia*.

33. Such as it is, strategic warning is inferred from human intelligence, from observations of the disposition of Soviet forces (including difficult-to-detect and perhaps inscrutably inactive attack submarines), and, most urgently and mechanically, from complex real-time analysis of intercepted electronic message traffic, including possible attack messages to the Soviet strategic forces. Not infrequent Soviet strategic and command and control exercises, and even computer bugs, worms, viruses, bad chips, wrong tapes, malicious pranks, and so forth, can and do suddenly cause alarming strategic warnings.

34. Moreover, in concert with the programmatic alerting process, an initially spurious strategic warning foreseeably risks fulfilling itself. Beyond cavil, it is foreseeable that: United States globally preprogrammed electronic alerting actions would alarm the Soviet Union; this would exacerbate military and political tensions and likely cause responsive alerting actions; this would not merely confirm but would amplify the original strategic warning; this would cause greater tensions, and by this virtually electronic "feedback" loop, very quickly the highest levels of mutual nuclear

alert would be likely reached. In sum, the dynamically linked strategic warning and nuclear alerting processes are inherently both unreliable and unstable.

35. Nevertheless, for use in the event of a strategic warning that sufficiently alarms the executive branch, the SIOP contains a major group of options called "preemption."[4] In analytic war-game terms, preemption may be called "going-first-intercontinental," and driving the military decision to preempt are force correlation indices exemplified by the "price-of-going-second-intercontinental."[5] This, in terms of expected before and after missile count ratios that assume an intercontinental nuclear exchange *will* occur, reports the appreciable military cost of going second versus going first, at that particular moment.

36. Haste and stress accompany the most urgent strategic warnings, which could project an arbitrarily close time for Soviet launch. A preemption decision must necessarily be taken by the United States at least about 45 minutes in advance of this time, for one characteristic of preemption options is the targeting of Soviet missile silos by Minuteman and MX missiles,[6] the intention being to destroy virtually all silo-based Soviet missiles in their silos, which includes many in densely populated areas, forestalling their use and significantly swaying the numerical balance of useable nuclear warheads.[7] This is made arithmetically possible by the multiplicity of attacking

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[4] The executive seems to distinguish between "preemption," by which is meant launch on strategic warning, and "first strike," by which is meant launch without any warning. Air Force and other executive officials have seemingly denied that the SIOP contains a "first strike" option, and Plaintiff does not dispute them based on this understanding of their vocabulary. However, the public commonsensically construes preemption as a form of first strike.

[5] *A New Methodology for Modelling National Command Level Decisionmaking in War Games and Simulations*, (1986) RAND R-3290-NA, at 88-90.

[6] The planned deployment of Trident II submarines, beginning by the end of 1989, may actionably implicate the Navy chain of command in some forms of preemptive strike. If the case is not by then moot, Plaintiff may add them as Defendants, as appropriate. The same may apply in the more remote future re a proposed "Midgetman" missile Air Force chain of command.

[7] In such computations, it is allowable to discount Soviet deaths by programming the

warheads per attacking missile. Military command bunkers are also targeted, to forestall or impair issuance of launch orders. But, because of the inherent unreliability of strategic warning, and because of the plainly high probability of catastrophic retaliation by surviving Soviet nuclear forces,[8] the execution by the United States of a preemption option on its face would constitute folly beyond the bounds of reason, even if it were otherwise lawful.

37. In any case, because the decision of one branch of government ruled by one man cannot be safely secured within the bounds of reason, it is inherently dangerous to operate Minuteman and MX missiles so that such a one-branch decision could cause immediate preemption.

F. Inherently dangerous tactical warning and LUA.

38. Hereafter, a "tactical" warning is by definition a sensor-based warning that the Soviet Union may have launched nuclear missiles at targets in the United States, the warning being generated while at least some missiles are in flight. For use at the time of such a warning, the SIOP contains a group of options called "Launch Under Attack" (hereafter "LUA"), which is conceptually divisible, as follows. If the tactical warning indicates that one or more nuclear detonations may have already occurred over the United States, a subgroup of options called "Launch On Impact" (hereafter "LOI") pertains, whereas if the tactical warning is prior to the inferential report of any such detonation, a subgroup of options herein called "Launch On Warning" (hereafter "LOW") pertains.

"expertise" that the *Soviet* commanders discount this value, a theory which has indeed been touted by official nuclear strategists. The convoluted upshot is that mere missile counts drive *United States* commanders' decisions. Such artificial intelligence capabilities, programmable in real-time, pose an often overlooked source of ridiculous risk.

[8] A single one-megaton explosion over a large American city would kill more people from the heat, blast, and radiation than the 650,000 Americans who have ever died in battle in all the wars fought by the United States in the last 200 years.

39. Soviet missile launch and flight are reported by an immensely complex global computer network including satellite, land-based, and otherwise platformed, electromagnetic sensors, of both passive and active varieties. All such sensors are prone to report spurious detections. Moreover, a common mode of false detection arises from the elementary fact that the tremendous volume of data from multiple sensors is necessarily reduced to a few messages and display screens by novel, compromisable, and largely untestable anticipatory artificial intelligence techniques, generally called "data fusion." However, these techniques officially can infer an attack even if some sensors suffer loss of signal.

40. For LOI, impact may be either affirmatively reported by satellite sensors detecting the unusual, if not unique, electromagnetic "signature" of nuclear detonations, and/or impact may be inferred merely from losses of signal. Although the former type of nuclear detonation detection is ordinarily reliable (though less than perfect), the inherent risks of the real-time data fusion process thwart realization of this reliability. The latter form of detection by loss of signal is blatantly error-prone, but it is officially applied to some degree.

G. LUA versus decapitation.

41. So-called "decapitation" scenarios represent anticipated nuclear attacks in which the United States nuclear command and control systems are the initial targets of off-coast Soviet ballistic missile attack submarines, possibly supported by off-coast cruise missile carrying submarines and bombers, and by follow-on intercontinental ballistic missiles. *These scenarios are neither speculative nor futuristic, for they are concretely coded in the SIOP, and automatic procedures constantly query whether such a scenario is fact.* For example, the Command Director of the United States Space Command solemnly and suddenly decides, many times per month, at the quasi-random prompting of computers, that the United States is not under nuclear attack.

42. By coordinate-coded definition, decapitation targets include tactical warning systems, military communication nodes and lines, and major military headquarters, including the Joint Chiefs of Staff's and the Strategic Air Command's headquarters, and the Satellite Control Facility located in Sunnyvale, California. Also targeted, of course, would be the White House and the Pentagon, which could be destroyed in less than about 7 minutes after the first launch. Because the Defendants' (and also the Joint Chiefs of Staff's) heartland headquarters could not be destroyed until about 15 minutes after the first launch, this provides a few minutes after the inferred destruction of Washington in which the Defendants, but not the vaporized President, could issue an EAM specifying a LOI option requiring immediate launch.

43. Another important decapitation scenario is a nuclear attack in which said United States nuclear command and control systems are targeted by a barrage from the off-coast attack submarines and bombers, *synchronized* so as to cause the virtually simultaneous destruction of these command and control targets at about 15 minutes after the first launch. Follow-on Soviet intercontinental ballistic missiles could then destroy any unlaunched Minuteman and MX missiles in their silos within about 35 minutes of said first launch. In order for Minuteman and MX missiles to hold their targets at risk in this scenario, LOI is insufficient, because it is incredible that an EAM communicating the essential release codes could even be issued (let alone also received and executed), *after the first barrage* (and before the arrival of the intercontinental ballistic missiles). For this scenario, LOW is unduly relied upon by the Defendants, who are zealous in their perpetual readiness to execute an EAM requiring that launch occur even prior to the anticipated first detonations.

H. LUA decisionmaking's two governing thresholds.

44. The computer system that generates a tactical warning is at all times tended by the aforesaid on-duty Command Director of the United States Space Command,

whose primary duty is, in the event of a computerized tactical warning, to certify that his on-duty computer operators certify that the computers appear to be operating properly, by declaring a state of "confirmed" attack. The warning information, which is simultaneously shared with CINCSAC and other Defendants, is also communicated to the National Command Authorities, an exclusively executive body which must in at most a few minutes decide whether to issue an EAM specifying a LUA option.

45. Computers assess the size of the attack and the nature of its targets, and also recommend the supposedly optimal SIOP LUA retaliatory option(s). In the event of a declaration of "confirmed" attack, a supposedly "measured" affirmative or negative LUA decision will be forced by rapid, mandatory checklist-compelled drills. These drills must and do complete within a few minutes, because they are absolutely bounded by a so-called "use-them-or-lose-them" deadline, after which a LUA option could not be executed due to the damage caused by the projected attack.

46. *At best,* the time for so-called presidential so-called decisionmaking in some LUA versus decapitation scenarios is some 4 minutes. In view of the patent shortness of time, the extraordinary and stressful circumstances, the immense complexity of the tactical warning system, and the well-established fallibility of man and machine; and as evidenced by shocking false warnings in the past; it is clearly not possible to verify conclusively a tactical warning by the deadline. In other words, an attack that is declared "confirmed" before the deadline, is certainly not *conclusively* confirmed.

47. So that Minuteman and MX missiles hold their targets at risk in LUA scenarios, the Defendants are *de facto* governed by two kinds of, at worst, arbitrary, and, at best, rule-of-thumb thresholds, as follows: **(a)** *the level of alert or "action-stations" threshold* -- notwithstanding the perpetual DEFCON 4 readiness of Defendants, and the real possibility of a LUA decision being effected without a prior strategic warning, the LUA option is positively favored only in the event of a strategic

or tactical warning sufficiently alarming to trigger the next higher level of missile alert, roughly equivalent to DEFCON 3;[9] **(b)** *the reported size of attack or "into-action" threshold* -- given such a missile alert, and then a tactical warning, if the computers report that the number and pattern of attacking missiles fall within essentially statistical boundaries, then the attack would be declared "confirmed," and a virtually immediate LUA decision would be taken as to whether or not to retaliate immediately, and, if so, by which SIOP option. Of course, under the concomitant haste and stress, this so-called decision is in practice no more than a most desperate gamble.

48. Apart from the much greater complexity of the LUA technology and associated operations, the LUA decisionmaking process is temporally similar to the decisionmaking process followed when the United States alerted ship the *Vincennes* tragically shot down an ordinary civilian airliner in its regular flight corridor over the Persian Gulf on July 3, 1988.

I. Defendants' responsibilities for the standing orders.

49. The SIOP is summarized for the President's and the Secretary of Defense's review by the military, *without external accountability*. It has been reputably published that the President has in the past been wholly uninformed of clearly critical details re nuclear release and use, notwithstanding these summaries. In framing the SIOP, CINCSAC is obliged to consider planning guidance expressed in the Joint Strategic Capabilities Plan, a document produced by the Chairman of the Joint Chiefs of Staff, which is not reviewed in any form by any civilians, not even by the President or the Secretary of Defense. It is supposed to translate the President's directives into military terminology that combatant commanders can understand and act upon. The fact that

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[9] For example, concurrent with the alert, prepackaged electronic messages redirect satellite sensors. The aforesaid Satellite Control Facility, near to which the Plaintiff works, plays a vital role in accomplishing such time-urgent changes.

the Chairman of the Joint Chiefs of Staff *defines* actionable military terminology amounts to a military arrogation of all-encompassing power that catastrophically nullifies civilian oversight. For example, a "confirmed" attack could expressly imply authorization for, if not require, "damage limiting" or "return of fire" retaliatory missile launch. This may not seem inappropriate -- until it is appreciated that a mere *warning* of attack could give rise to a duty to declare a "confirmed" attack.[10]

50. Under 10 U.S.C. §§ 151.153, the Chairman of the Joint Chiefs of Staff is the chief military adviser to the President, the Secretary of Defense, and the National Security Council, and he has strategic planning and command oversight responsibilities, and he is the military officer holding highest rank. However, in accord with congressional intent firmly declared in 50 U.S.C. § 401, under 10 U.S.C. §§ 155(e),163(b). he may not command CINCSAC, and no exhortation by him alone can bind CINCSAC to issue said standing orders that at all times guarantee immediate responsiveness to launch orders or EAMs.

51. Under 10 U.S.C. § 162(b), Defendant CINCSAC is under the command of only the President and the Secretary of Defense. Under 10 U.S.C. § 164(c) Defendant CINCSAC has full "authoritative direction over all aspects of military operations" of the Strategic Air Command, including "employing forces within that command as he considers necessary to carry out missions assigned to that command," which allows any degree of delegation or automation; all this *"[u]nless otherwise directed* by the President or the Secretary of Defense" (emphasis added).

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[10] This "logic" is exemplified in a report on strategic versus tactical warning sponsored by the Air Force, namely *Strategic Warning And General War: A Look At The Conceptual Issues*, (1979) RAND N-1180-AF, at 24-26 states (emphasis added):

> The actions driven by warning -- flushing the bomber force, launching ICBMs on attack assessment, and the like, are straightforward . . . [T]he precursors [warning signals] themselves have a clear and unambiguous relationship to the threat ... so much so as to be *tautologically equivalent* to an attack in progress.

52. Plaintiff is unaware of any standing orders issued by the President or Secretary of Defense requiring that Minuteman and MX missiles be operated on perpetual alert so as to assure immediate responsiveness to launch orders or EAMs in preemption and LUA scenarios.[11] The Plaintiff avoids this speculation, and justifiably presumes that CINCSAC is responsible for issuing said standing orders. Even if this presumption were incorrect. CINCSAC would, with all other Defendants, still be responsible for agreeing to follow and for following said standing orders.

J. Congress' refusals to delegate or consent to preemption or LUA.

53. At the 1787 Constitutional Convention, a motion that countenanced presidential declaration of war was ill-received, found no seconder, and was quickly withdrawn. Wherefore, the Constitution of the United States, at Article I § 8, mandates that "The Congress shall have Power . . . To declare War . . . To raise and support Armies, but no Appropriation to that Use shall be for a longer Term than two Years." These clauses were intended to preclude precisely the kinds of risks complained of herein. As James Wilson explained to the Pennsylvania ratification convention (quoted in *War Making Under The Constitution: The Original Understanding*, (1972) Yale L.J. Vol. 81, 672, by Lofgren):

> This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large: this declaration must be made with the concurrence of the House of Representatives: from this circumstance we may draw the certain conclusion that nothing but our national interest can draw us into war.

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[11] Plaintiff is aware of a presidential standing order effective October 1, 1957, which is still in effect, and which requires quick-launch alert of a large proportion of the strategic bomber fleet. Air Force publications generally bracket bomber and missile levels of alertness, but because bomber launch is not an irrevocable commitment to nuclear attack, the 1957 standing order cannot reasonably be construed to cover the later operation of intercontinental ballistic missiles.

Likewise, Madison stated that (quoted in *War Making by the President*, 121 U.Penn.L.R. (1972) at 48):

> Every just view that can be taken of this subject, admonishes the public of the necessity of a rigid adherence to the simple, the received, the fundamental doctrine of the Constitution, that the power to declare war, including the power of judging the causes of war, is fully and exclusively vested in the legislature: that the executive has no right, in any case, to decide the question, whether there is or is not cause for declaring war; that the right of convening and informing Congress, whenever such a question seems to call for a decision, is all the right which the Constitution has deemed requisite and proper.

Thus it appears that the powers to commence war which are at issue herein cannot be delegated by Congress to the executive branch, absent a constitutional amendment.

54. In any case, such a delegation was decisively declined by the Congress in 1971, as follows. Recognizing at least that participation of Congress in the commencement of war is essential, but arguing the advantages of delegation or "preconsent," Senator Stennis proposed an amendment to the War Powers Resolution (1973) 50 U.S.C. §§ 1541-1548 which would have unambiguously yielded full authority to the President to launch nuclear missiles in the event of strategic or tactical warning of a Soviet attack, worded as follows:

> The President may [unilaterally] use the Armed Forces. . . to prevent or defend against an imminent nuclear attack on the United States by the forces of any foreign government, but only if the President has clear and convincing evidence that such attack is imminent.

55. In hearings on the amendment, preemption was objected to by the Chairman of the Senate Armed Services Committee, Senator Fulbright, saying:

> the President would be the sole judge, if he thought it was a dangerous situation, and that we might be attacked, then he has the right under this to launch a first-strike . . . without consulting anybody . . . If he thinks the country is in danger he may launch a nuclear war.

Regarding LUA, Senator Cooper stated for the record:

> [I]f the Soviets launched a strategic nuclear ICBM attack, it would take about 25 minutes from the time we had radar warning until . . . the warhead hit,[12] but in that time the President would have to decide whether to fire before we were hit . . . I think everyone here has agreed and those who have participated in our hearings agreed that we really would have to wait until they hit otherwise you might be countering with nuclear forces able to destroy much of the world and its people against what might be a non-nuclear attack.

The Stennis amendment was withdrawn. *War Powers Legislation*, hearings before the Senate Committee on Foreign Relations. 1973. S.J.Res. 95, § 2(3), at 593,618,713.

56. In 1988, the rejection of the Stennis amendment was recalled in *The War Power After 200 Years: Congress and the President at a Constitutional Impasse*, hearings before the special subcommittee on war powers, Senate Committee on Foreign Relations, 100th Cong., 2nd sess., Jul-Sep, 1988. Senator Sarbanes (at 28-29) stated that "I take it then, that we are in agreement that there is a limited set of circumstances under which the President has to act, and that we perceive a constitutional authority for doing so." He then asked: "What is the view of the panel members about situations that would clearly fall outside of those limited circumstances?" In response, Senator Eagleton recalled the rejected Stennis amendment, as follows: "There is one that is in the bill that I referred to that was the most controversial amongst Senators Stennis, Javits, and myself. The Presidential right to forestall enemy attack. It gets into first strike."

57. Further, effective September 15, 1978, the National Emergencies Act (1976) 50 U.S.C. § 1601 terminated the state of national emergency proclaimed on December 16, 1950, in Presidential Proclamation Numbered 2914, because of "the increasing menace of the forces of communist aggression." The National Emergencies Act prescribes that the President, to exercise emergency powers, must issue a proclamation

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[12] This 1971 scenario predated the aforesaid 15 and 7 minute scenarios introduced in the late 1970s by deployments of Soviet nuclear attack submarines.

specifying the provision(s) of law under which he intends to act, which "shall be immediately transmitted to the Congress and published in the Federal Register." and any such proclamation automatically terminates after one year, unless expressly renewed. 50 U.S.C. §§ 1621,1622.

58. Conclusively, there is no state of national emergency in effect that could even arguably constitute legal justification or moral excuse for said inherently dangerous standing orders to launch Minuteman and MX missiles immediately upon exclusively executive order or EAM. Further, the challenged agreements to standing orders have persisted for many more than two years, so they are certainly subject to the fullest congressional controls. CJ is, in effect, challenging the DEFCON, 4th with its risks.

K. The appalling constitutional controversy.

59. In this matter of universal concern, the executive branch flouts the constitutional mandate that only the Congress declare war, by adopting the frivolous contention that the power of Congress to constrain the President is limited to withdrawal of funding after the President starts a war, and that the act of declaring war is largely intended to provide for post-facto public endorsement of a unilateral presidential commencement of hostilities. It is small wonder that a sequence of actual unilateral presidential commencements of hostilities, even after the War Powers Resolution was passed, lead to the Senate Foreign Relations Committee holding the aforesaid hearings in 1988 on the "Constitutional Impasse."

60. In a prepared statement representing the executive's official position, the State Department's legal advisor, Mr. Sofaer, outrageously claimed that *(The War Power After 200 Years, supra,* at 1051):

> Congress and the American people in fact expect that the President will use military force placed by Congress at his disposal . . . This is true even with respect to the most serious forms of military power -- the use of nuclear weapons. In placing such weapons at the President's disposal, Congress has recognized that the President must have the authority to use them without prior approval.[13]

61. The legal opinion of the present National Security Advisor, General Scowcroft, is likewise outrageous. For example, he has categorically expressed the opinion that it is within the President's unilateral constitutional authority to suddenly invade Nicaragua or Poland, if he thinks such action to be in the overall security interests of the United States. *The War Power After 200 Years*, *supra*, at 122-23.[14] Further, in a hearing in the Ninth Circuit Court of Appeals, the executive branch ludicrously argued that the President had the unilateral right to launch nuclear missiles, simply because the use was "limited in time." *Johnson v. Weinberger* CA-84-2495 (Jul. 10, 1985), Attachment B herewith at 14.

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[13] In the hearings, Senator Biden pointedly disputed this claim, but Mr. Sofaer would not yield, as follows (*Id.* at 151):

> SENATOR BIDEN: So, by us equipping the President with nuclear weapons, we have not authorized him to initiate a first strike?
> MR. SOFAER: You have given the President an enormous power, but it is within the context of hundreds of hearings, of many, many discussions between the executive branch and the President, many discussions with the Joint Chiefs, all kinds of regulations and rules that have been created, strategy plans that have been shared with Congress and with the leaders of Congress.

However, as aforesaid, the Joint Strategic Capabilities Plan and the bulk of the Single Integrated Operational Plan are not shared with the President, let alone with the Congress.

[14] In the ensuing debate, General Vessey even claimed that it was up to the Joint Chiefs of Staff, rather than the Congress, to give the required consent to a presidential order to start a war. *Id.*, at 130. Both General Scowcroft and Vessey were instrumental in devising the present reliance upon LUA decisionmaking.

III. STANDING

A. Causation: three perpetual concrete risks of accidental launch.

62. By virtue of the concrete, continuous risk of a spurious strategic warning causing a sudden, unstable nuclear alert, in which LUA options are *de facto* in force; together with the concrete, continuous risk of a spurious tactical warning of a sizeable nuclear attack; together with the computer-governed drills that dictate that urgent preemption and immediate LUA decisions be followed in the event of, respectively, strategic and tactical warnings: the continuous preparedness of Defendants to execute a launch order or EAM immediately upon receipt demonstrably gives rise to concrete, continuous risks of **(a)** foolish preemption, or **(b)** mistaken LUA launch of Minuteman and MX missiles at targets in the Soviet Union. In operational terms, these risks are similar to those raised by the unauthorized pointing of a loaded gun, which is *prima facie* reckless conduct. *People v. Schwartz* (1978) 382 N.E.2d 59,64, 21 Ill.App.3d 989. This responsibility pertains even where the threat to an individual is collateral, provided that it is foreseeable. *State v. Henly* (1984) 687 P.2d 1220,1222, 141 Ariz. 465.

63. *In addition* to these foreseeable dangers of foolish or mistaken launch in a spurious alerting crisis, the perpetual readiness of Defendants to launch Minuteman and MX missiles immediately upon receipt of a cryptologically valid EAM *per se* raises **(c)** a possibly small but surely unconscionable danger of utterly unwilful launch, in operational terms similar to the risks of an aircraft crashing, which sound management may reduce, but can never eliminate, and which unsound management may gravely exacerbate. Unfortunately, poor management of supporting data processing technologies, combined with unscientific expressions of confidence in the technologies by responsible military commanders, give rise to a justified, indeed unavoidable, nagging concern regarding the latter risk of accidental launch unprovoked even by a flimsy warning.

B. Redressability: the declaratory relief is effective.

64. Notwithstanding the constitutional controversy, the effectiveness of the declaratory relief sought is assured by virtue of: **(a)** the large number of the Defendants, whose standing orders must be re-issued to conform with the court's declaration; **(b)** the *acknowledged* authority of the court to definitively interpret the Constitution. This was affirmed re war powers by the executive's spokesperson, Mr. Sofaer, as follows *(The War Power After 200 Years, supra,* at 1398):

> Certainly, in our system, where the courts have ruled on the rights of parties properly before it, the parties have an obligation to comply with the ruling. That is of course true whether it is an executive official or a legislative official or any other party whose rights the courts have adjudicated.

C. Fifth Amendment injury: the basic threat of personal harm.

65. Beyond cavil, the irrevocable launch of Minuteman and MX missiles at targets in the Soviet Union gives rise to a substantial likelihood of a retaliatory nuclear strike by surviving Soviet nuclear forces on the United States, in which the Plaintiff is likely to lose his life. Plaintiff complains of that *his own* life "is immediately in danger," which is *per se* a personal threat of personal harm not shared by anyone else, and is sufficient injury to establish a *prima facie* Article III case or controversy, under the Fifth Amendment's due process clause. *Frotheringham v. Mellon* (1923) 262 U.S. 447,488; *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.* (1982) 454 U.S. 464; and *United States v. SCRAP,* (1973) 412 U.S. 669, which at 687 emphasized, with citations, that a personal injury would grant standing *even though shared by "all who breathe."* In view of this, it is not necessary to reach any further to find standing.

D. Fifth Amendment injury: three further particularities

66. In any case, the injury is otherwise particular to Plaintiff in that: **(a)** the courts are Plaintiff's *sole* due process recourse, for, as a resident alien, even though he

pays regular United States taxes and could be called into military service, he is not qualified to vote, nor has he a congressman to petition for legislative redress -- and this special consideration establishes a *prima facie* due process claim under the two-part standard of *Rainbow Val. Citrus Corp. v. Federal Crop Ins. Corp.* C.A.Ariz.1974, 506 F.2d 957; **(b)** the risk to Plaintiff's life and employment is palpably higher than the risk to the lives and employments of many other people, for he works close to what is beyond reasonable doubt a topmost priority target in a Soviet nuclear strike, namely, the Satellite Control Facility located in Sunnyvale, California, whereas huge other areas comprising *most* of the United States, are devoid of targets, and are not downwind or downstream of targets, so that the chances of survival in a nuclear exchange are obviously and palpably very much higher there -- and such demographic particularity is sufficient for standing under the standards of *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, (1978) 438 U.S. 59; and **(c)** Plaintiff's qualifications in Operations Research cause him objectively displeasing awareness and immediate apprehension regarding the Defendants' unsafe, unnecessary, unlawful, mathematically contrived, and logically flawed nuclear launch operations, which many otherwise educated people suffer less acutely, if at all -- and this is more than sufficient injury for standing under the standards of *Restatement (2nd) of Torts* (1965) § 7, of *Duke, supra*, and of *United States v. SCRAP, supra.*

E. "Martens clause" and "Treaty of London" standing.

67. Two further grounds for standing arise separately under international law. The same factual particulars establish both claims, namely: **(a)** as resident alien, Plaintiff's obligations and duties towards the United States do not differ materially from those of citizens, and he lives under the protection of its laws; **(b)** the Plaintiff pays tax that concretely supports the Defendants' challenged activities; **(c)** the Plaintiff's qualification in Operations Research and experience of computer

management give him a specially cogent appreciation of the crimes against the peace which he specifies below; **(d)** the Plaintiff has no procedural means to have his complaint formally answered by the United States government, other than in court. Because statutes impliedly include all that is required to give them effect, both the enacted Martens clause and the enacted Treaty of London include an implied grant of jurisdiction to the courts, and of standing to the Plantiff, as follows.[15]

68. The statutory Martens clause of The Hague Convention Respecting the Laws and Customs of War on Land, *supra*, declares that "in cases not included in the Regulations adopted by them, the inhabitants . . . remain under the protection and the rule of the principles of the law of nations, as they result from . . . the dictates of the public conscience." Wherefore, in view of the unconscionable concern that must attach to the credibly brought allegations herein of virtually mechanical risk;[16] and under the rule of international law enacted by the Congress; and under Article III's mandate of jurisdiction re controversies; the public conscience dictates that the Plaintiff have standing, and that this court have jurisdiction to hear his controversial complaint of crimes against the peace.

69. In *Ex parte Quirin*, (1942) 317 U.S. 1, the Supreme Court implicitly recognized the culpability of individuals who physically support their government's violation of international law. Under the statutory Treaty of London, *supra*, at Article 6, culpability for crimes against the peace is ascribed to all individuals who participate

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[15] Where statutes give rise to rights or obligations, "the silence of Congress as to judicial review is . . . not to be construed as a denial" of standing to sue the government. *Stark v. Wickard* (1944) 321 U.S. 288,309.

[16] An attack on the Soviet Union "limited" to so-called "counterforce" targets, mainly comprising Soviet missile silos, would kill up to 20,000,000 Soviets immediately, and subsequently kill many millions more. An all-out attack would cause up to 160,000,000 immediate Soviet deaths, and would also give rise to a positive chance of human extinction due to the possible ensuing nuclear winter. See also Attachment A herewith.

in the formulation or execution of war crimes, and, in *United States v. Friedrich Flick*, (1947) Case 5, the *Flick Case*, the Nuremberg Military Tribunal consequently ruled that "individuals holding no public offices and not representing the State" nevertheless "come within the class of persons criminally responsible for a breach of international law," and so sent private businessmen to jail. Wherefore, especially in view of his taxpayer contribution to the challenged activities, and in view of his particular professional qualifications, the Plaintiff has the standing and duty to complain, and this court has the jurisdiction and duty to hear his complaint, against the Defendants' crimes against the peace. ? CJ is not culpable if he merely fails to resist... or, for giving taxes

F. Guarantee clause and equal protection clause standing.

70. *With regard to the Third Count and Fourth Count only*, the guarantee clause (Article IV § 4) grants additional jurisdiction to this court to hear, and furthers the standing of the Plaintiff to prosecute, a complaint that alleges the controversial imposition of nonrepublican government by the executive branch. It is alleged that nonrepublican government (unequally, as detailed in paragraph 66 above, in violation of the Fifth Amendment's equal protection clause) controls and threatens the Plaintiff, and that Congress is unable to resolve the constitutional controversy. Plaintiff recognizes that the power of the guarantee clause is rarely invoked in cases or controversies, but contends that the awesome threat to the very existence of posterity, though palpably less likely than the actionable threat to himself, in this case extraordinarily invokes a clause that its most prominent proponent, congressman Charles Sumner, aptly termed the "sleeping giant." *Congressional Globe*, 40 Cong., 1 sess. 614 (July 12, 1867). This ground for standing is elaborated in paragraphs 106-08 below.

IV. FIRST COUNT - POWER TO DECLARE WAR

IN PEACETIME, DEFENDANTS' DUTY IS TO DISOBEY AN EXCLUSIVELY PRESIDENTIAL LAUNCH ORDER OR EAM, BECAUSE THEY KNOW OR PLAINLY SHOULD KNOW THAT IT REPRESENTS A LIKELY FIRST ACT OF WAR

71. Plaintiff incorporates by reference as though fully set forth herein paragraphs 1-70 above.

A. Definition of "peacetime."

72. Herein, *peacetime* is defined to be any period prior to an act of Congress properly authorizing hostilities against the Soviet Union, and prior to the conclusive, which implies more than sensor-based, confirmation that the United States is under or has suffered actual armed attack from the Soviet Union: otherwise, there is said to be a state of war. The First Count includes all lesser counts which would arise if peacetime were more restrictively defined, for example as the period prior to a Soviet attack on the United States *or its allies*.

B. A launch order received in peacetime inherently risks being an unlimited first act of war.

73. On its face, an actual launch order or EAM received by Defendants prior to their knowledge of a state of war *inherently* risks being a first act of war because: **(a)** if it is either a knowingly preemptive or utterly accidental order issued in peacetime, then it is a basic first act of war; **(b)** if it is a LUA order, it risks being a basic first act of war on account of the ineradicable uncertainty of any tactical warning; **(c)** even if the order is in response to a conclusively confirmed attack by the Soviet Union (of which the Defendants are not informed under the above definition of peacetime), the Defendants nevertheless act on the positive information that preemption and LUA options may be ordered at any time, and so *they know that their compliance at least risks execution of a first act of war exclusively by the executive branch.* Further,

Defendants are informed that they would normally be appraised of a conclusively confirmed actual attack by the Soviet Union, and so a launch order or EAM received without this extrinsic intelligence most likely *would* be a preemptive or LUA order, rather than a wartime order.

74. Manifestly, any such a launch order or EAM *substantially risks* being an unlimited first act of war exclusively by the executive branch.[17] In view of their commands, all Defendants know or plainly should know this much.

C. Unconstitutionality of standing orders in peacetime.

75. Constitutional law Professor Ball contends, and so does the Plaintiff, that not even the the Congress has the power "to declare [nuclear] Armageddon." *Nuclear War: The End Of Law*, in *Nuclear Weapons And Law*, (1984) A. Miller ed., at 287. Without waiving this contention, which, if granted, would summarily dispose of the First Count, and assuming, *arguendo*, that the Congress has this power, the following applies.

76. Ordinary soldiers, let alone the commander-Defendants, know or plainly should know that, under the Constitution, *only* the Congress can declare or start *any* war, let alone unlimited war. *This mandate commonsensically precludes even the deliberate risking of commencement of limited war by the executive, let alone the deliberate risking of commencement of unlimited war by the launch of Minuteman or MX nuclear missiles.*

77. A launch order or EAM, received by Defendants in peacetime, on their information inherently risks being an unlimited first act of war, issued without any congressional authorization or consent on its face. A launch order or EAM issued in

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[17] This would be true even if other possibilities were admitted, such as "loyalty test" launch orders, issued with correct authentication codes but invalid enabling codes, to test whether missile combat crews would in fact "turn keys" on order.

peacetime without any form of congressional consent is manifestly issued in excess of the executive's constitutional authority, and so is on its face void *ab initio*. Derivatively, said standing orders to obey such an EAM at any time are unconstitutional and void, and the Defendants' agreements to, pledges to, and present support of said standing orders are all unlawful.

D. Illegality of standing orders under international law in peacetime.

78. The Hague Convention Relative to the Opening of Hostilities, (1907) 36 Stat. 2259 at Article 1 precludes the commencement of hostilities without a good cause made certain between the enemy states. In peacetime, the United Nations Charter (1946) at Article 2 Part 3 binds the United States to settle disputes "in such a manner that international peace and security, and justice, are not endangered." Also, the United Nations Charter at Article 2 Part 4 binds the United States to refrain from "the threat or use of force" against another state.[18]

79. Said standing orders inherently endanger the peace and threaten the lives of a very large number of innocent and defenseless civilians. Even ordinary soldiers, let alone the officer-Defendants, know or should know that international law binds all states at peace not to endanger or break the peace, and that the launch of nuclear missiles is an act of unlimited war. Derivatively, Defendants know or plainly should know that the standing orders to obey an EAM received in peacetime are unlawful under binding international law.

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[18] The United Nations Charter at Article 51 provides an exception for acts of self-defense, which generally (many jurists say absolutely) precludes violent "anticipatory self-defense." In particular, under the declared law of the land, computerized strategic or tactical warnings are insufficient to meet the requirements of Article 51. See "Resolution on the Definition of Aggression," Dec. 14, 1974, U.N.G.A. Res. 3314(XXIX), 29 U.N. GAOR Supp. (No.31) 142, U.N. Doc. A/9631 (1975). See especially Article 2 ("The first use of armed force . . . shall constitute *prima facie* evidence of an act of aggression"), and Article 5(1) ("No consideration of whatever nature, whether political, economic, *military or otherwise*, may serve as a justification for aggression"; emphasis added).

E. Defendants' culpabilities re standing orders.

80. Defendant CINCSAC is presently committed, upon inevitably less than conclusive warnings giving rise to preemption and LUA scenarios, to obey, without exercise of governmental discretion, an order from the President or Secretary of Defense to attack the Soviet Union with Minuteman and MX nuclear missiles, and he is presently responsible for issuing said standing orders that assure immediate launch on such exclusively executive demand. These standing orders require that all Defendants will, without exercise of governmental discretion, obey any cryptologically valid EAM that they receive at any time.

81. Because the Constitution strictly prohibits even the possibility, let alone the likelihood, that the executive unilaterally commence unlimited war; and because international law prohibits even the possibility that the United States initiate unlimited war; the Defendants know or plainly should know that the execution of such a launch order or EAM, which they are informed raises just such possibilities, is unlawful.

82. Obviously, the execution of an unlawful EAM would unlawfully kill a large number of indisputably defenseless and innocent people, and so it would constitute a crime under 10 U.S.C. § 918 or § 919, and a war crime under Article 6(b) of the Treaty of London, *supra*, and a grave and criminal breach of Article 147 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949) 6 U.S.T. 3516, 911 U.N.T.S. 376, by all the Defendants who would execute it. Presently, Defendants' conduct constitutes an inchoate crime under the Model Penal Code's § 5 prohibitions against conspiracy, solicitation, and facilitation, and is a crime against the peace under the Treaty of London, *supra*, which at Article 6(a) prohibits planning, preparation, participation, and conspiracy to initiate or wage war in violation of international law.

83. Against these charges, neither the particular EAM, nor the standing order to execute such an EAM on receipt, nor even the misleading and prejudicially subordinate opinions of executive's paid national security and legal advisors, including Air Force judge advocates and nuclear operations training staff, constitutes a legal defense: by virtue of the manifest unlawfulness, each is at most a mitigating circumstance. A military officer is under a duty to disobey an order that he/she knows or plainly should know to be unlawful. *U.S. v. Calley*, (1973) CM 426402, 46 CMR 1131; *aff'd* 22 USCMA 534, 48 CMR 19, RDPMDG 1974; Treaty of London, *supra*, Article 8.

84. Defendants unjustifiably and without adequate excuse are personally responsible for the inherently dangerous operations, in which they evince a gross deviation from reasonable standards of care, and a wanton and reckless disregard of human life. It is the Defendants' plain duty not to obey said standing orders, and to rescind their various agreements and pledges to obey an exclusively executive launch order or an EAM received at any moment, even in peacetime.

WHEREFORE, Plaintiff prays as hereinafter set forth.

V. SECOND COUNT - POWER TO EXPAND WAR

EVEN IN A CONVENTIONAL WAR, DEFENDANTS' DUTY IS TO DISOBEY AN EXCLUSIVELY PRESIDENTIAL LAUNCH ORDER, BECAUSE THEY KNOW OR PLAINLY SHOULD KNOW THAT IT REPRESENTS A LIKELY FIRST NUCLEAR USE

85. Plaintiff incorporates by reference as though fully set forth herein paragraphs 1-70 above.

A. Relationship to the First Count.

86. Whereas the First Count challenged the legality of risks raised by said standing orders *in the present peacetime*, the Second Count more generally complains that said orders embody a *first use* of nuclear weapons, which is prohibited *even when a conventional war is underway*. Although no state of conventional war presently exists that would *require* reaching this broader ruling, yet the broader issue presented in the Second Count may be properly preferred because the legal grounds set forth do include present circumstances, and they may be more expediently resolved as a matter of law, because the legal questions are very simple and direct, namely: **(a)** Is the special consent of Congress to nuclear first use impliedly required under the Constitution? **(b)** Is the first use of nuclear weapons inherently "disproportionate" in the context of a non-nuclear war?

87. In one important particular, however, the Second Count is *narrower* than the First count, for it excludes all Defendants other than CINCSAC and his ordinary deputies. This restriction is made because it might be unreasonable to suppose that lower ranking Defendants *plainly* should comprehend the nuclear applications of the Constitution's lesser war powers clauses (based on the power to expand war) and of the international law against disproportionate response (based on absolute qualitative distinctions). This is alleged in paragraph 98 below.

B. Restriction of Defendants.

88. The Defendants in the Second Count are CINCSAC and all who may regularly assume his command when he is not personally present and on-duty.

C. A launch order received without appraisal of any prior nuclear use inherently risks being a first nuclear use.

89. On its face, an actual launch order or EAM received by Defendants prior to their being appraised of a state of nuclear war *inherently* risks being a first act of nuclear war because: **(a)** if it is either a knowingly preemptive or an utterly accidental order, then it is a basic first act of nuclear war; **(b)** if it is a LUA order, it risks being a basic first act of nuclear war on account of the ineradicable uncertainty of any tactical warning; **(c)** even if the order is in response to a conclusively confirmed nuclear attack by the Soviet Union (of which the Defendants are not appraised under the conditions of this Second Count), the Defendants nevertheless act on the affirmative information that preemption and LUA options may be ordered at any time, and so *they know that their compliance at least risks execution of a first act of nuclear war.*

90. Further, Defendants are informed that they would normally be cognizant of a conclusively confirmed actual nuclear attack by the Soviet Union, and so a launch order or EAM received without this extrinsic intelligence most likely *would* be a preemptive or LUA order, rather than an order conclusively in the context of an already begun nuclear war. Manifestly, such a launch order or EAM substantially risks being an unlimited first act of nuclear war by the executive branch.[17] In view of their commands, all Defendants know or plainly should know this much.

D. Congress must now consent to nuclear first use.

91. The Constitution of the United States at Article I § 8 mandates that "The Congress shall have Power . . . To declare War, grant letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support

Armies, but no Appropriation to that Use shall be for a longer Term than two Years; . . . To make rules for the Government and regulation of the land and naval forces; To provide for calling forth the Militia to execute the Laws of the Union . . . and repel Invasions." The same section of the Constitution assigns to the Congress the power to define and punish piracies and felonies on the high seas, and to punish offenses against the law of nations.

92. Besides deciding upon the commencement of general war, through the Marque and Reprise and other above-referenced Article I clauses, the Congress was given the power of decision over *all* initial acts of war, however limited, including the powers of authorization over the employment of mercenaries, over acts of reprisal, and, at least in broad terms, over rules of engagement, that is, over standing orders issued to potential combatants, which contingently grant permission to *fire first*. Without exception, the Constitution assigned to the Congress and not to the executive branch the power both to begin war in a limited fashion, and then to expand it qualitatively. *The War Power After 200 Years*, *supra*, at 8,9,22,98-100.

93. Owing to the catastrophic threat of the superpowers' present nuclear arsenals, *any* first use of nuclear weapons by the United States against the Soviet Union is now a crossing of an internationally recognized "firebreak" between conventional and nuclear war. Any first nuclear use is a sowing of the wind that risks reaping the whirlwind, and so constitutes a qualitative expansion from a conventional war. Therefore, under the Constitution, first nuclear use requires the consent of Congress. True, the smallest nuclear weapons have a lower explosive yield than the largest conventional weapons. But any such use of nuclear weapons would entail the deadly poisonous aftermath of radiation, and so even low-yield nuclear use is prohibited under Article 23 (a) ("poison") and (e) ("unnecessary suffering") of the Hague Convention Respecting the Laws and Customs of War on Land, *supra*. Yet,

even without the distinctive hazard of radiation, the greater truth is that, considering all probable outcomes, *any* first nuclear use is qualitatively distinct and inherently disproportionate, *as a matter of law*.

E. International law now prohibits nuclear first use.

94. It is a firm principle of international law that wholly disproportionate response to an attack is prohibited, and the United States is obligated to respect this principle under the Hague Convention Respecting the Laws and Customs of War on Land, *supra*, and under the United Nations Charter, *supra*, at Article 38. As a matter of law, any first nuclear use against the Soviet Union, let alone an intercontinental ballistic missile attack, constitutes a disproportionate response to a conventional attack, and so it is prohibited under the law of the land.

F. The Air Force's contrary publications.

95. Notwithstanding, the Air Force contends that first use of nuclear weapons does not require congressional consent and is not inherently disproportionate. The Judge Advocate General of the Air Force, in *OpJAGAF 1981/42, 13 July 1981*, published the firm opinion that the nuclear launch decision is at law no different from other Article II § 2 commander-in-chief decisions, and is untouched, and even untouchable, by any statutory or other constitutional proscriptions. International law was thought to merit no mention, but the same questionable opinion is promulgated without question in official Air Force manuals, which state *en passante* that there is no special distinction under international law between the use of nuclear and conventional weapons. Yet the same manuals recognize the international prohibitions against poison, unnecessary infliction of suffering, and disproportionate response. *International Law -- The Conduct of Armed Conflict and Air Operations* U.S. Dept. of the Air Force, AFP. 110-31, Nov 19, 1976, at 5-10, 5-17 fn.18, 6-3, and 6-4.

G. Defendants' culpabilities re standing orders.

96. Those who may act as a Commander in Chief of the Strategic Air Command have a duty to know and plainly should know that under the Constitution the first use of nuclear weapons against the Soviet Union requires the consent of Congress; even though, given this consent, the first use thereafter may well be by executive choice. In addition, Defendants have a duty to know and plainly should know that the first nuclear use associated with an attack with intercontinental ballistic missiles is inherently a disproportionate response even in a conventional war, and is therefore prohibited under international law.

97. Defendants are presently committed, upon inevitably less than conclusive computer report of a preemption or LUA scenario arising, to obey an order from the President or Secretary of Defense to attack the Soviet Union with Minuteman and MX nuclear missiles. Defendant CINCSAC is presently responsible for issuing said standing orders that assure the immediate launch of Minuteman and MX missiles on such exclusively executive demand, irrespective of whether the launch would be a first use of nuclear weapons. All other Defendants are responsible for following and agreeing to said standing orders. These standing orders require that the Defendants of lower rank will, without exercise of governmental discretion, obey any cryptologically valid EAM that they receive at any time.

98. Because the Constitution strictly prohibits even the possibility that the executive alone qualitatively expand war; and because international law prohibits even the possibility that the United States disproportionately respond in a state of war; the Defendants know or plainly should know that the execution of such a launch order or EAM, which they are informed raises just such possibilities, is unlawful.

99. Plaintiff incorporates by reference as though fully set forth herein paragraphs 82,83 above.

100. Defendants unjustifiably and without adequate excuse are personally responsible for the inherently dangerous operations, in which they evince a gross deviation from reasonable standards of care, and a wanton and reckless disregard of human life. It is the Defendants' plain duty not to obey said standing orders, and to rescind and renounce their various agreements and pledges to obey an exclusively executive launch order or an EAM received at any moment, in peacetime or in a non-nuclear war.

WHEREFORE, Plaintiff prays as hereinafter set forth.

VI. THIRD COUNT - REPUBLICAN GUARANTEE

AT ALL TIMES, DEFENDANTS' DUTY IS TO DISOBEY AN UNQUALIFIED OR SUDDEN LAUNCH ORDER OR EAM, BECAUSE THEY KNOW OR PLAINLY SHOULD KNOW THAT IT REPRESENTS A COMPUTER DECISION

101. Plaintiff incorporates by reference as though fully set forth herein paragraphs 1-70 above.

A. Relationship to the First Count.

102. Whereas the First Count challenged the legality of risks raised by standing orders re LUA and preemption *in the present peacetime*, the Third Count challenges the legality of said standing orders on the ground that they constitute a judicially cognizable form of nonrepublican government by machine, which is prohibited *at all times*. The Third Count also includes all lesser counts that would arise were the period restricted, e.g., to the period prior to any nuclear use, or to peacetime.

B. Unqualified launch orders represent computer decisions.

103. On its face, a launch order or EAM received by Defendants which is unqualified, or suddenly received without explanation, may be a preemption or LUA order, according to the Defendants' standing orders. As aforesaid, preemption decisions are driven by computerized warning and force correlation indices, and so are *de facto* governed by computer: without these indices, no preemption decision would be made, and because of them, a decision is required, which is based heavily upon the values of those indices.

104. While some preemption scenarios do allow arguably sufficient time for human decisionmaking based on extrinsic human intelligence, the same cannot be said of LUA decisionmaking, which in all cases is *de facto* governed by computer; without computer prompts, no LUA decision at all would be taken; and, simply because of computer prompts, a virtually immediate LUA decision is mandated; and, that

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decision is based fully on the information provided by the computers.

105. In view of these circumscribing facts, the construction that in practice computers make the controlling LUA decisions is required under the *de facto* or realistic interpretive standards unhesitatingly applied in *Bowsher v. Synar*, (1986) 106 S.Ct. 3181-3191. which ruled:

> To permit the execution of the laws to be vested in an officer only answerable to Congress would, in practical terms, reserve in Congress control of the execution of the laws... There is no merit to the contention that the [officer] performs his duties independently and is not subservient to Congress. Although nominated by the President... the [officer] is removable only at the initiative of Congress... the political realities do not reveal that the [officer] is free from Congress' influence... [a]lthough he is to have 'due regard' for [executive rulings]... The congressional removal power created a 'here-and-now subservience' of the [officer] to Congress... In constitutional terms, the removal powers... dictate that he will be subservient to Congress . . . Unless we make the naive assumption that the economic destiny of the Nation could be safely entrusted to a mindless bank of computers, the powers that this Act vests in the [officer] must be recognized as having transcendent importance.

Just so, the minimal LUA timeline "in practical terms" assures the dominance of military computers in LUA decisionmaking, which gives rise to a "here-and-now subservience" of governmental to military, and of military to mechanical, bodies.

C. The guarantee clause prohibits said standing orders, grants jurisdiction, and, together with the equal protection clause, furthers standing.

106. *Bowsher v. Synar, supra*, demonstrates that the constitutionality of decisionmaking regulations is a proper legal question, properly brought by an individual whose constitutional rights are allegedly infringed. (The standing of congressmen was not reached because an individual had more obvious standing accruing from a threat of personal harm.) Article IV Section 4 Clause 1 of the Constitution mandates that the United States, which includes the judicial branch, shall guarantee a republican form of government. Unquestionably, military government is

not republican government. *Luther v. Borden*, (1849) 48 U.S. 1,45. *A fortiori*, government by the military's computers is not republican government.

107. Under the standards set forth in *Baker v. Carr*. (1962) 369 U.S. 186, when a delimited feature of executive conduct is credibly challenged as imposing a form of nonrepublican government upon a Plaintiff living under the unequal protection of the laws of the United States, this constitutes a potentially actionable invasion of a constitutional right both under the guarantee clause (at 242-3, Justice Douglas' concurrence), and under the Fifth Amendment's equal protection clause (main opinion, did not reach guarantee clause). This potential is realized provided the judicial branch is the final recourse.

108. Herein, the executive disputes that the challenged feature is a nonrepublican form of government, and so persists; and Congress is unable to frame legislation that restricts that conduct, which it publicly deplores, and yet either unintentionally or disingenuously permits, through endorsing verbal vagaries, as evidenced below. In these circumstances, which have persisted too long already, then it squarely falls upon the judiciary to declare the constitutional guidance that it alone can definitively decide, and which is necessary to give effect to the guarantee of republican government. Wherefore, the guarantee clause grants jurisdiction and, together with the equal protection clause, furthers Plaintiff's standing.

D. Congress is demonstrably unable to resolve this palpable controversy of constitutional interpretation.

109. The confusion and impotence of Congress re overseeing the nuclear hair-trigger is typified by the following statement of Senator Nunn, the chairman of the Senate Armed Services Committee, in a 1987 interview (Gary Krane, Ideal Communications, Washington, D.C.):

> You have computers making a lot of the initial dec- [sic] assessments . . . The ultimate of that, which I hope we have never formally adopted, and I would like to see us never formally adopt, is what's known as a launch on warning policy, meaning that if we believe we are under attack, before we are absolutely certain of that, we may very well launch ourselves, because if we don't we're in a situation where we lose a lot of our deterrent. That is a very dangerous situation.

The belief of Congress' leading strategic legislator, that launch on warning or launch under attack has *not* been adopted as formal "policy," is astonishing, since it is on record that these options are encoded components of the SIOP, which were adopted by a series formal decisions, and activated according to a precise schedule, based on the recommendations and specifications of such entities as the executive's National Targeting *Policy* Review Study.

110. Congress has demonstrably "swallowed" a misleadingly restrictive and uncommon application of the word "policy" that has been vehemently promulgated by the executive branch when directly confronted on this launch under attack or launch on warning "policy" issue in congressional testimony. *Our Nation's Nuclear Warning System: Will It Work If We Need It?* hearing before the subcommittee on Legislation and National Security of the House Committee on Government Operations, 99th Cong., 1st sess., Sept 25, 1985, at 109. According to this interpretation, a plan becomes called a "policy" only if and when it is executed, and not when it is operationally activated and relied upon to guard against the contingency that would trigger its execution.

111. The confusion of congressional overseers is also exemplified by Senator Nunn's above aurally unmistakable mid-word switch, when he began to say that computers made the initial "decisions," which he changed to "assessments." The inference that computers, rather than humans, *de facto* take the initial decisions in LUA scenarios is natural, and even commonsensical. However, beyond the bounds of

reason, key congressmen act as though they believe that human *discretion* is assured just so long as some indefinite human *action* is required.

112. This patently invalid principle was even solemnized by the Congress in the Fiscal Year 1988 Defense Authorization Bill, by the enactment of an amendment proposed by Senator Bumpers. which roundly prohibits command and control systems (re satellite-based anti-ballistic-missile defenses) that do not provide for "human decisionmaking." A so-called "boost-phase" decision to open fire must be guaranteed within about a minute after remote satellite sensors detect Soviet missile launch. Although offensive nuclear missile launch is not the overt subject matter of the amendment, the automatic initiation of *lesser* hostilities was supposed to be prohibited under its language. Nevertheless, its application to nuclear missile launch is not alleged. What is alleged is that its language is read by the executive as permitting essentially mechanical "boost-phase" defenses, subject, at most, to merely token human reflex participation in the action of opening fire, with human decisionmaking occurring only in advance of the sensor detection.

113. Specifically. the National Defense Authorization Act FY 1988-89. Conference Report to a Company, H.R. 1748, Division A (Department of Defense Authorizations), Title II (Research, Development, Test, and Evaluation), Part C (Strategic Defense Initiative), Subpart I (SDI Funding and Program Limitations and Requirements), Section 224 *(Architecture to Require Human Decisionmaking)*. reads:

> No agency of the Federal Government may plan for, fund, or otherwise support the development of command and control systems for strategic defense in the boost or post-boost phase against ballistic missile threats that could permit such strategic defenses to initiate the directing of damaging or lethal fire except by affirmative human decision at an appropriate level of authority.

The terms "affirmative" and "appropriate" being undefined, the act is vapid at the outset. Though intended as a restriction ensuring that no system is built that operates

autonomously, it is read to permit the remote switching-on of a mechanical defense, at any time, by a console commander. Just such "battle management software" is actually being developed under the auspices of the funded "National Test Bed," and just such hardware is actually being developed under the auspices of the funded "Space-Based Interceptor" and "Kinetic Homing Interceptor Technology" programs. Mechanical "boost-phase" defense systems are the very first priority of funded research and development, and of deployment planning.

114. This situation makes a mockery of the statutory human decisionmaking requirement, and conclusively shows the gross inability of Congress to grasp the judicially declarable finding that a computer decision does not become a human decision merely because humans are required set switches in advance, or to suddenly press buttons when enough red lights flash and klaxons sound; *nor would the panacea of personal participation of even the President alter this truth one jot, as it derives from universal human limitations.*

115. The presumption that Congress understands the at-law locus of decisionmaking powers is further rebutted by their recent enactment of the budget deficit act, which in its original form was found unconstitutional. *Bowsher v. Synar*, *supra*.

116. Thus, an extraordinary judicial declaration is required, stating that as a matter of law, as well as commonsense, computers make controlling LUA decisions, and that this amounts to an intolerable surrender of republican government.

E. International law precludes nuclear launch decided by computer.

117. The Hague Convention Respecting the Laws and Customs of War on Land, *supra*, in 1907 announced agreement that "the High Contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders." In this clause, the word "arbitrary"

plainly characterizes military decisionmaking as nongovernmental in essence, else the clause would permit non-arbitrary military judgment, and so lose meaningful effect.

118. Thus, even if the launch of Minuteman and MX missiles on dubious warning of attack were conceivably legitimate, which the Plaintiff and a plethora of adopted United Nations' resolutions dispute,[19] the "unforeseen case" of the intercontinental nuclear launch decision could not be legitimately delegated to military commanders, let alone to their computers. In addition, delegation of LUA decisions to computers is not only prohibited *a fortiori* under this clause, but also directly under the immediately following part of the Martens clause, *supra*, in that such delegation is unconscionable among civilized nations.

F. Defendants' culpabilities re standing orders.

119. Defendant CINCSAC is presently committed, upon inevitably less than conclusive warnings giving rise to anticipated preemption and LUA scenarios, to obey, without exercise of governmental discretion, an otherwise unqualified order from the President or Secretary of Defense to attack the Soviet Union with Minuteman and MX nuclear missiles, and he is presently responsible for issuing said standing orders that assure immediate launch on such exclusively executive demand. These standing orders require that Defendants of lower rank than CINCSAC will, without exercise of governmental discretion, obey any cryptologically valid EAM that they receive at any time.

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[19] See, e.g. G.A.Res. 1380, 14 U.N. GAOR Supp (No. 16) at 4, U.N. Doc. A/4354 (1959); G.A.Res. 1643, 16 U.N. GAOR Supp. (No. 17) at 34, U.N. Doc. A/5100 (1961); G.A.Res. 2162, 21 U.N. GAOR Supp. (No.16) at 10, U.N. Doc. A/6316 (1966); G.A.Res. 2849, 26 U.N. GAOR Supp. (No. 29) at 70, U.N. Doc. A/8479 (1971); G.A.Res. 2936, 27 U.N. GAOR Supp. (No. 30) at 5, U.N. Doc. A/8730 (1972); G.A.Res. 3154, 28 U.N. GAOR Supp. (No. 30) at 34, U.N. Doc. A/9030 (1973); G.A.Res. 3246, 29 U.N. GAOR Supp. (No. 31) at 87, U.N. Doc. A/9631 (1974); G.A.Res. 35/152, 35 U.N. GAOR Supp. (No. 48) at 69, U.N. Doc. A/3548 (1980).

120. Even the least sophisticated soldier knows or plainly should know that a momentary decision that is basically statistical and immensely complex must be essentially governed by computer. Because the Constitution strictly prohibits even the possibility, let alone the likelihood, that computers decide the launch of an intercontinental nuclear strike: and because international law prohibits any such arbitrary possibility; the Defendants know or plainly should know that the execution of an unqualified or sudden launch order or EAM, which they know or plainly should know raises just such possibilities, is unlawful.

121. Plaintiff incorporates by reference as though fully set forth herein paragraphs 82.83 above.

122. Defendants unjustifiably and without adequate excuse are personally responsible for the inherently dangerous operations, in which they evince a gross deviation from reasonable standards of care, and a wanton and reckless disregard of human life. It is the Defendants' plain duty not to obey said standing orders, and to rescind their various agreements and pledges to obey an EAM received at any time, without extrinsic qualification, or suddenly.

WHEREFORE, Plaintiff prays as hereinafter set forth.

VII. FOURTH COUNT - MILITARY SUBDELEGATION

AT NO TIME MAY ANY DEFENDANT GENERATE OR CONSUMMATE A LAUNCH ORDER OR EAM WITHOUT THE PARTICULAR AND PERSONAL CONSENT OF THE PRESIDENT

123. Plaintiff incorporates by reference as though fully set forth herein paragraphs 1-70 above.

A. Relationship to the First Count.

124. Whereas the First Count challenged the risks raised by standing *orders* re *both* LUA and preemption *in the present peacetime*, the Fourth Count challenges the risks raised by standing *subdelegations* re *only* LUA[20] *at any time*. The Fourth Count also includes all lesser counts that would arise were the period restricted, e.g., to peacetime.

B. Restriction of Defendants.

125. The Defendants in the Fourth Count are CINCSAC and all under his command who presently assume an ongoing or standing subdelegated authority to take, alone or in collaboration with other military officers, the immediate LUA decision in the event that the President is not reachable before the aforesaid "use-them-or-lose-them" deadline.

C. Defendants' LUA subdelegations are improperly secret.

126. Whereas the First Count, the Second Count, and the Third Count may be more or less directly proved by Defendants' admissions, or from the face of the public record, the Fourth Count alleges subdelegations that Plaintiff believes based on rigorous inference from the public record. Simply stated, Air Force officers tell the Congress that their operation of Minuteman and MX missiles contributes a significant "Prompt-Hard-Target-Kill" quantity towards a definite overall nuclear "damage

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[20] Plaintiff does not allege that authority for preemption is subdelegated.

criteria line."[21] This numerical, operational claim would be unclaimable without specific LUA subdelegations, because it is demonstrably easy for the Soviets to opportunistically choose or create a moment of incapacity of the President. Thus, to prove the subdelegations, Plaintiff proposes only that he be permitted to presume the truth of an official claim, and be accorded the right to draw elementary inferences from it. In addition, there have been some credible "leaks" re aspects of the challenged agreements to subdelegations.

127. Besides, Plaintiff contends that the LUA subdelegations are in any case an unlawfully withheld secret. Primarily, it is alleged that the subdelegations are directly and separately prohibited by the Atomic Energy Act, *infra*, and by the guarantee clause of the Constitution, *infra*, as well as under international law. But, even if the subdelegations were permissible, 3 U.S.C. § 301 mandates that such subdelegations "shall be published in the Federal Register." This, *inter alia*, makes the alleged existence of the subdelegations a broad fact which, without impertinent detail, not only could but even *should* be discovered under the law. However, the Plaintiff need not discover the personal identities, titles, or even the full number of the Defendants in the Fourth Count, because it is sufficient that CINCSAC is named.

128. The subdelegations are strictly prohibited under the Hague Convention Respecting the Laws and Customs of War on Land, *supra*, as they concern arguably illegitimate, and certainly were then unforeseen, forms of warfare, which accordingly can only be lawfully decided upon by governmental authority. Defendants do not unambiguously deny these subdelegations, but officially contend that they are a proper executive secret which, even if true, would neither be illegal nor require publication.

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[21] *The MX Missile and Associated Basing Decision*, Senate Armed Services Committee hearing, Dec 8, 1982, at 34; and Senate Armed Services Committee, DOD Appropriations FY 1987, p.1590.

129. For example, faced with a direct question on a leaked-under-oath LUA sort of nuclear subdelegation in congressional hearings, the written reply provided by the Department of Defense drew the extraordinary subcommittee footnote: "Reply is not only inadequate on an unclassified basis but does not respond to the question which could have been supplied on a classified basis." *First Use Of Nuclear Weapons: Preserving Responsible Control*, hearings before the House Committee on International Relations, 94th Cong., 2nd sess., Mar. 25, 1976, at 184. See also the expression of mere "hope" that formal policy including LUA subdelegations did not exist, by the Chairman of the Senate Armed Services Committee, Senator Nunn, quoted at paragraph 109 above.

130. Congressional and executive hope, especially of the naive variety, is far too slim a reed upon which to lawfully rest the safety of the earth. Nor does the Constitution rest the safety of posterity on naive hopes. Where the political branches are naive as to properly controverted constitutional interpretation, it rests upon the judiciary to enlighten them, and so resolve the controversy.

D. Defendants' LUA subdelegations.

131. The military has custody of Minuteman and MX missile enabling and authentication codes, and has the physical capability to launch the missiles without a further personal presidential order to do so. Defendants' various public affirmations that authentication implies presidential authorization of an EAM tend to mislead the Congress and the public, for such authentication does not necessarily imply that the particular launch order or EAM was issued with the President's personal knowledge, let alone by his choice: else let the Defendant say so without ambiguity, and admit its unconstitutionality, and the Fourth Count will become moot.

132. The Judge Advocate General of the Air Force has published the opinion that the matter of nuclear subdelegations is without limit an executive prerogative

under the President's Article II § 2 commander in chief powers, and that accordingly "CINCSAC could, in our opinion, be legally authorized to command all strategic nuclear forces of the United States." *OpJAGAF 1981/42, 13 July 1981*. This opinion claims that the nuclear launch decision is at law no different from other military-presidential decisions, and is untouched, and even untouchable, by statutory or other constitutional proscriptions.

133. The same doctrine is promulgated in Air Force manuals, which state that there is no distinction under international law between the use of nuclear and conventional weapons, other than that nuclear use requires some undefined form of presidential authority. However, even statutorily "presidential" military decisions exist that President does not participate in, e.g., officer appointments. *International Law -- The Conduct of Armed Conflict and Air Operations* U.S. Dept. of the Air Force, AFP. 110-31, Nov 19, 1976, at 5-17 fn.18. (At 6-5 it is affirmed that the President is the "sole" nuclear use decisionmaker, but the possibilities of subdelegation and devolution are misleadingly bypassed, nor is Congress mentioned.)

134. Ordinary military-presidential decisions may be explicitly, and are by default implicitly, subdelegated, in that they automatically "devolve" to on-duty military commanders under comprehensive presidential *alter ego* and military necessity doctrines. In the probable circumstance that the President or other civilian official could not be contacted to make the retaliatory LUA decision before the aforesaid "use-them-or-lose-them" deadline, then the military, and in particular CINCSAC or his on-duty deputy, accordingly might, as a matter of perceived military necessity and on behalf of the President, at that time exercise devolved authority to generate a cryptologically valid EAM, or to consummate a launch order originating elsewhere within the military, for example from the Joint Chiefs of Staff, or from some alternate military headquarters.

135. Defendants of lowest rank, including missile combat crews, who receive and act on an EAM, do not really know whether a cryptologically valid EAM was disseminated by *personal* order of the President, or by the choice of military officer(s) acting on his behalf either by personally "predelegated" authority or by devolved authority triggered by military declaration of a "confirmed" attack.

E. Congress prohibits standing LUA subdelegations.

136. The Atomic Energy Act (1946, amnd. 1954) was enacted first and foremost to guarantee civilian control over the military use of nuclear weapons. In particular, 42 U.S.C. § 2121, provides: "The President from time to time may direct [the delivery of] atomic weapons to the Department of Defense for such use as he deems necessary in the interests of national defense." 42 U.S.C. § 2122 strictly prohibits all other use, thus affirmatively barring standing or ongoing, contingent subdelegations.[22] In framing the act, the matter of subdelegations to the military was hotly debated, and the intent to prohibit them was made clear over strong military objections.

137. Since the act, Congress may have impliedly, constitutionally or otherwise, consented to subdelegation of nuclear launch authority to submarine commanders, effective only after *conclusive* confirmation of the destruction of political authority in the United States; for this extraordinary and less immediate subdelegation is public knowledge and has not been openly deplored by members of Congress. However,

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[22] The 1953 Subdelegation Act, 3 U.S.C. § 301, which generally permits subdelegation, in this case yields to the Atomic Energy Act, for 3 U.S.C. § 302 excepts subdelegations which are affirmatively prohibited by other statute. Note incidentally that "contingent subdelegations" of nuclear launch decisions are popularly called "predelegations," which tends to obscure the fact that they are, at law, here-and-now subdelegations. Note also that, as expert witness Dr. Hutchins testified: "nothing in this [Atomic Energy] act" delegated "the power to drop an atomic bomb. That would be an act of war on which Congress would have to take its own position." *Atomic Energy Act of 1946*, hearings on S. 1717 before the Senate Special Committee on Atomic Energy, 79th Cong., 2nd sess., Jan 23, 1946, at 126-7, see also 538.

members of Congress have consistently expressed frustration at lack of unambiguous denials of, and have deplored, subdelegation of nuclear launch authority to military commanders, effective if and when proper political authority could not be immediately contacted in the event of *necessarily less than conclusive* strategic and/or tactical warning of attack.

F. The Constitution precludes standing LUA subdelegations.

138. As constitutional war powers expert Professor Bickel informed the Senate, "under our Constitution Congress and the President cannot make a forward commitment in certain circumstances to go to war." *War Powers Legislation*, *supra*, at 565. The same "live government" doctrine precludes ongoing, contingent subdelegations of Minuteman and MX nuclear launch authority to the military, with or without the consent of Congress, for it constitutes a forward commitment by the political branches to go to war, or to new and ultimate heights of war.

139. The Minuteman and MX launch decision surely requires at least the particular and personal decision of the commander in chief, who is the President. But even his participation does not remove the fact of computer dominance. Even were the Minuteman and MX launch decision an executive prerogative under the President's Article II § 2 powers as commander in chief, he still could not subdelegate such an awesome responsibility without inherently surrendering the republican form of government, which Article IV § 4 Clause 1 of the Constitution contrariwise requires that the United States (which includes the executive and the judicial departments) "guarantee." Unquestionably, military government is not republican government. *Luther v. Borden*, (1849) 48 U.S. 1,45.

G. International law precludes standing LUA subdelegations.

140. Plaintiff incorporates by reference as though fully set forth herein paragraph 117 above.

141. Thus, even if the launch of Minuteman and MX missiles on dubious warning of attack were conceivably legitimate, which the Plaintiff and a plethora of adopted United Nations' resolutions dispute,[19] the "unforeseen case" of the intercontinental nuclear launch decision could not be legitimately delegated to, let alone assumed by, military commanders. In addition, delegation of LUA decisions to mere military commanders is not only prohibited under this clause, but also under the immediately following part of the Martens clause, *supra*, in that such military omniscience is unconscionable among civilized nations.

H. Defendants' culpabilities re standing subdelegations.

142. Those who may order the launch of Minuteman and MX missiles know or plainly should know that the law prohibits subdelegations of intercontinental nuclear launch authority to the military, and so they know or plainly should know the unlawfulness of the subdelegations to themselves. Yet the Defendants have arrogated the here-and-now-responsibility, effective upon inevitably less than conclusive warnings giving rise to a seeming LUA scenario, to assume authority for taking the immediate nuclear launch decision on behalf of the President, if he cannot be contacted in time, which in the extreme circumstances is probable.

143. Plaintiff incorporates by reference as though fully set forth herein paragraph 82 above.

145. Against these charges, neither the fact that the standing subdelegations may have been authorized by the Secretary of Defense or by the President, nor the misleading and prejudicially subordinate opinions of the executive's paid national security and legal advisors, including Air Force judge advocates and nuclear

operations training staff, is a legal defense, because, as aforesaid, the Defendants know or plainly should know of the unlawfulness; and, of course, the unilateral assumption by the Defendants of the standing subdelegations without any such authorization, for "plausible deniability" or other presumptuous reasons, would heighten the impropriety. A military officer is under a duty to disobey instructions that he/she knows or plainly should know to be unlawful. *U.S. v. Calley*, (1973) CM 426402, 46 CMR 1131; *aff'd* 22 USCMA 534, 48 CMR 19, RDPMDG 1974.

146. Defendants unjustifiably and without adequate excuse are personally responsible for the inherently dangerous operations, in which they evince a gross deviation from reasonable standards of care, and a wanton and reckless disregard of human life. The Defendants' plain duties are to revoke, rescind, renounce, and reject said standing subdelegations, and not to agreeably assume them, as they now do.

VIII. PRAYER FOR DECLARATORY RELIEF

WHEREFORE, Plaintiff prays that this court:

(a) *For the First Count*, declare that:

> Defendant CINCSAC's present peacetime standing orders to launch Minuteman and MX missiles, immediately upon exclusively presidential order or upon receipt of a cryptologically valid EAM: *(i)* unconstitutionally abrogate the Article I § 8 powers of Congress to declare war and to oversee the standing armed forces: *(ii)* violate the obligatory Hague Convention Relative to the Opening of Hostilities at Article 1, and the United Nations Charter at Article 2 Part 3 and Part 4, by endangering and threatening to break the peace; *(iii)* against the dictates of the public conscience, culpably and continuously risk a multitude of innocent lives, particularly that of the Plaintiff, in violation of his due process rights under the Fifth Amendment to the Constitution. *Wherefore*, said standing orders, and all pledges to follow them, and support of them are manifestly unlawful, and the Defendants' duties are to revoke, reject, rescind and disobey them.

(b) *For the Second Count*, declare that:

> Defendant CINCSAC's present standing orders to launch Minuteman and MX missiles, immediately upon exclusively presidential order or upon receipt of a cryptologically valid EAM, even in a conventional war: *(i)* unconstitutionally abrogate the Article I § 8 powers of Congress to expand war, because the very first use of nuclear weapons now requires particular congressional consent; *(ii)* violate international law made obligatory under the Hague Convention Respecting the Laws and Customs of War, and under Article 38 of the United Nations Charter, in that the very first nuclear use would be inherently disproportionate in the context of conventional war; *(iii)* against the dictates of the public conscience, culpably and continuously risk a multitude of innocent lives, particularly that of the Plaintiff, in violation of his due process rights under the Fifth Amendment to the Constitution. *Wherefore*, said standing orders, and all pledges to follow them, and support of them are manifestly unlawful, and the Defendants' duties are to revoke, reject, rescind, and disobey them.

(c) *For the Third Count*, declare that:

Defendant CINCSAC's present standing orders to launch Minuteman and MX missiles, immediately upon exclusively presidential order or upon receipt of a cryptologically valid EAM, at any time: *(i)* substantively surrender the republican form of government by virtue of their *de facto* subdelegation of ultimate governmental and military decisionmaking powers to mechanical systems, in violation of Article IV Section 4 Clause 1 of the Constitution; *(ii)* violate the Hague Convention's prohibition against delegation beyond civilian control of the decision to engage in unforeseen forms of warfare that arguably violate established international law, and also violate the Martens clause in that the subdelegation of such awesome decisionmaking to computers is unconscionable among civilized nations; *(iv)* against the dictates of the public conscience, culpably and continuously risk a multitude of innocent lives, particularly that of the Plaintiff, in violation of his due process and equal protection rights under the Fifth Amendment to the Constitution. *Wherefore*, said standing orders, and all pledges to follow them, and support of them are manifestly unlawful, and the Defendants' duties are to revoke, reject, rescind, and disobey them.

(d) *For the Fourth Count*, declare that:

Defendants, who presently assume a standing subdelegated authority to take the immediate LUA decision in the expected event that higher authority is not reachable in the brief time-frame, do so in dereliction of duty, in that such standing subdelegations: *(i)* are prohibited under the Atomic Energy Act, at 42 U.S.C. §§ 2121,2122; *(ii)* substantively surrender the republican form of government by virtue of their emplacement of ultimate governmental decision-making powers in military hands, in violation of Article IV Section 4 Clause 1 of the Constitution; *(iii)* violate the Hague Convention's prohibition against delegation to military commanders of the decision to engage in unforeseen forms of warfare that arguably violate established international law, and also violate the Martens clause in that delegation of such awesome decisionmaking to the military is unconscionable among civilized nations; *(iv)* against the dictates of the public conscience, culpably and continuously risk a multitude of innocent lives, particularly that of the Plaintiff, in violation of his due process rights under the Fifth Amendment to the Constitution. *Wherefore*, said standing subdelegations and Defendants' agreed assumptions thereof, are unlawful, and the Defendants' duties are to refuse, renounce, and otherwise nullify them.

(e) grant such other and further relief as this court deems fit and proper.

VERIFICATION

Having researched the matter, Plaintiff hereby declares under penalty of perjury that the foregoing is true and correct, based upon his information and belief.

SIGNED C. Johnson DATED 7/3/89

Clifford Johnson,
Plaintiff *pro se*.

CPSR

Computer Professionals for Social Responsibility

P.O. Box 717
Palo Alto, CA 94301
(415) 322-3778

Gary Chapman
Executive Director

April 28, 1989

Dr. Clifford J. Johnson
Information Technology Services
Polya Hall
Stanford University
Stanford, CA 94305

Dear Dr. Johnson:

I am writing to inform you that the Board of Directors of Computer Professionals for Social Responsibility has adopted unanimously the enclosed statement in support of your "Proposed Complaint" in United States District Court.

We believe that the issues raised in your filing are critically important and wish you every success in your work to bring this debate into a public forum.

Sincerely,

Eric Roberts

Eric Roberts, Ph.D.
CPSR National Secretary

Statement in support of the lawsuit
Johnson v. Chain, et al.

Approved unanimously by the Board of Directors of
COMPUTER PROFESSIONALS FOR SOCIAL RESPONSIBILITY, INC.

April 28, 1989

Despite the INF treaty and the thaw in U.S.-Soviet relations, the pressure for faster and faster decision making in the release of retaliatory missiles continues to increase. Numerous factors contribute to this pressure: the vulnerability of our command and control system to off-coast submarines; the greater accuracy of modern missiles which threaten our land-based deterrent forces; and a strong tradition in the military toward quick-launch readiness in the face of a "use them or lose them" situation.

The military's response to these pressures has been to increase the levels of automation of our defensive and retaliatory forces. But the sizable liabilities of this process have not been weighed carefully against the benefits. As we reduce human participation in a system, we remove human judgment as well. In systems that are both complex and critical, this is extremely dangerous. As higher and higher levels of evaluation and decision making are relegated to computer programs, both the likelihood and the consequences of errors increase. We are already at the point where readiness to launch on computerized warning of an imminent or in-progress nuclear attack gives rise to a realistic threat of accidental missile launch triggered by computer error.

There is little public understanding of the nature of computer errors. The press reports only a small fraction of the errors that occur in critical systems, and these reports are themselves simplified to such an extent that critical details are usually ignored. Press reports often focus on identifying a single cause of error, despite the fact that most errors arise from interactions in a complex system. Moreover, simple accounts convey the impression that there are simple solutions — that these errors can be eliminated through incremental repair. However, the problem is far more serious, for the following reasons:

1. The most pernicious computer errors are not failures of the device itself (the hardware), but rather errors in the programming (the software). As such, these failures do not stem from inadequacies in the technology, but rather from the inability of human beings to formulate totally adequate plans (programs) for dealing with complicated, poorly understood situations, especially those where events and circumstances are likely to arise which cannot be anticipated.

2. While trivial mistakes can have serious consequences, simple carelessness is not the principal source of errors in computer programs. A much more serious problem is our inability to anticipate all of the possible interactions that can occur between various parts of a complicated program, and between complicated programs and their human users. Even after they have occurred, many such errors can only be understood by someone who has a thorough familiarity with how the program works.

3. Errors can and do remain hidden in computer programs for many years. They reveal themselves only when triggered by some set of unusual and unforeseen circumstances. Complicated programs dealing with uncertain and poorly understood situations are those most likely to contain hidden flaws.

4. When a computer error occurs, the consequences are likely to be totally unpredictable behavior rather than mere degradation in performance.

5. The inclusion of a person "in the loop" does not ensure meaningful human decision-making or protection against computer failures. Given the time-critical nature of computer-generated attack warnings, it is not possible to provide for independent verification of those warnings. Inevitably, the computer operators and ultimately their combatant commanders must rely and act upon the computer reports, notwithstanding the very real possibility of error.

error:
e.g. 1) component failing to perform as designed, intended;
2) or performing, intended, undesired system interaction;
3) "certain" identification that is wrong...

BUT...*

see EAM problem; levels of plans...

* Can system be designed to yield high-probability, or high-probability, only if event is actually occurring?

6. While methods exist that help to reduce certain kinds of errors, it is not possible to eliminate them completely. In 1985, the Eastport Panel, convened by the Strategic Defense Initiative Organization to devise a response to the SDI battle management computing problem, put it very simply: "All systems of useful complexity contain software errors." The best method for locating problems is testing in the circumstances of actual use, but even exhaustive testing cannot ensure that all possible errors have been found. Partial testing and simulation are even less effective means for locating potential problems.

7. No amount of research will "solve" these problems because they are rooted in the frailty of human understanding and lack of prescience rather than in the computer. While the terms "artificial intelligence," "program verification," and "automatic programming" appear to offer potential "solutions" to this problem, it is because people tend to invest these terms with much more power than they actually possess. These are technical terms which have meanings far more restricted than those attributed to them by the lay public. Computers do what we instruct them to do. If we instruct them incorrectly or inappropriately, they will do something wrong. This is an inescapable fact.

A launch on warning system must be incomprehensibly complex, and can never be fully tested under realistic conditions. Given these facts and the inevitability of some computer error, it is our opinion that launch on warning is an extremely dangerous capability. We are concerned that the government is pursuing such a capability, in the misguided belief that computer technology can safely be entrusted with important decisions regarding the release of nuclear weapons. Such a course flies in the face of all of our experience with complex computer systems. If this course is allowed to continue unchecked, it is only a matter of time before a catastrophic error occurs.

This danger is inherent in our continued reliance on the so-called nuclear "hair trigger" policy, whereby intercontinental ballistic missiles remain on alert, perpetually ready for immediate launch. In conjunction with programmatic procedures for making immediate decisions based on computerized strategic and/or tactical warnings, this reliance carries with it an unacceptable risk of accidental launch.

i.e. a dangerous "option"/cap. to have, like loaded gun in the house.

As computer professionals, we believe that these risks are serious and that they raise questions of fact that require resolution in a public forum. We believe that Clifford Johnson's legal action to secure such public resolution is equally serious and that it addresses these questions in a technically competent and ethically compelling way. On this basis, the CPSR Board of Directors endorses the Dr. Johnson's "Proposed Complaint."

IN THE APPELLATE COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

CLIFFORD J. JOHNSON,

Appellant/plaintiff,

vs.

CASPAR WEINBERGER, as SECRETARY OF DEFENSE,

Appellee/defendant.

No. 84-2495

APPEARANCES:

For the Plaintiff — CLAUDIA BRISSON
66 Mint Street
San Francisco, California 94103

For the Defendant — JOHN F. PENROSE
United States Attorney General
450 Golden Gate
San Francisco, California 94102

Court Reporter — Doris A. Thompson
251 Kearny Street
San Francisco, California 94108

impact the hostile country?

MS. BRISSON: Yes, it does make a difference. The complaint is applied to retaliatory missiles not anti-ballistic missiles. He speaks about your cruise and strategic missiles that are aimed to destroy and kill rather than intercept or blow up something.

THE COURT: And I take it that you're not against any missile, that any form of interception, even the Star Wars concept would be permissible, and not be subject to the rule that you're attempting to enunciate?

MS. BRISSON: Right, yes. The Star Wars concepts are really not within the scope of the declaration that he seeks.

THE COURT: All right.

MS. BRISSON: Thank you.

THE COURT: Thank you, Ms. Brisson.

MR. PENROSE: May it please the Court, good morning. My name is John Penrose. I'm an Assistant United States Attorney in San Francisco representing defendant, Secretary Weinberger.

The issue, of course, in this matter is not whether a Launch on Warning Capability is the dumbest idea since the Dred Scott decision, but rather whether

the issue should be before this branch of government at all. It is clearly proper for the District Court to have dismissed this matter preliminarily under the political question doctrine because it fails to clear virtually any of the tests set out in Baker vs. Carr, which I think both sides agree is a seminal case on what the political question doctrine actually means. Of the tests --

THE COURT: I thought that the prosecution was clear that only Congress can declare war. That's not a political question. That's a constitutional issue.

MR. PENROSE: Your Honor, I don't think that the issue presented here is a declaration of war.

THE COURT: Well, indirectly it is. She says that Congress can only declare war and certain acts that may take place by the executive exceed the executive's constitutional rights.

MR. PENROSE: Well, Your Honor, clearly the executive has the power to fight the words that are limited, or that is, to commit military forces to combat in conflicts that are limited in time and scope. And I believe the War Powers Act -- for example, to pick one out of the air -- provides a procedure by which the president is empowered to

commit forces for a period of time, that within that period of time if he intends to go beyond the time limit, he must make a report to Congress, and Congress essentially must ratify what he has done where he must withdraw those forces. But the fact remains that he can commit forces for a limited scope of time. It is a sad fact --

THE COURT: (Is) the launching of a missile with nuclear warheads be limited military action?

MR. PENROSE: It would be limited, I think Your Honor, in time, yes. I don't think that --

THE COURT: It would be very limited in time for everyone.

MR. PENROSE: And I don't think that anybody envisions, who seriously considers the question -- God forbid that nuclear war should ever start -- but if it did, that it would be preceded by resolutions, deliberation, a formal declaration of war by the houses of Congress

THE COURT: I'm not sure you're really dealing with the appellant's basic theory, which is that with this kind of capability that there could be an act of war by this country without any decision being made by anyone. That in effect, the decision whether to strike would have been turned over to a

computer and no human being will be involved in that decision. So the decision to implement this capability is in itself a decision to engage in nuclear combat, if something happens beyond the control of anyone, of any of our governmental leaders. And that's effectively a declaration of war, and the president has taken that without the approval of Congress. That's the theory, as I understand it.

MR. PENROSE: Your Honor, I'm not sure that is the theory, but I'm also not sure of Your Honor's question.

THE COURT: Well, the question is, if that theory is a valid theory, then doesn't the implementation of this system require the approval of Congress?

MR. PENROSE: The implementation of the Launch on Warning Capability would necessarily have the approval of Congress, because Congress is funding whatever research and procurement is involved in acquiring that capability, if in fact the executive and the military are acquiring that capability.

THE COURT: There's 20 million cases on the books. The constitution says, merely because Congress appropriates money is not congressional approval of anything. Now the question really is, what is your

definition of politics? The Court should not engage in political affairs? The declaration of war is a political question?

MR. PENROSE: Yes, Your Honor, I believe it is.

THE COURT: What's your definition of a political question?

MR. PENROSE: My definition of a political question is: Does it meet any of the tests set up by Baker vs. Carr? Is it an issue referred by the constitution to a coordinate political department by a textually demonstrable commitment within the constitution? I believe this case clearly is. We're dealing here with military, diplomatic affairs.

THE COURT: It says only Congress can declare war. You talk about anything which is strict interpretation is that, or anybody else. It says only Congress.

MR. PENROSE: Your Honor, I respectfully submit that their case does not present an issue concerning Congress's power to declare war. The plaintiff's theory says, concedes in fact, that the president has the power to launch missiles. And that their theory is that it is somehow repugnant to the constitution that the president should be able to

launch missiles before incoming missiles have actually been confirmed as impacting on United State's soil or alternatively, that the president has, under certain circumstances, delegated to computers or some sort of electronic sensors the decision to signal the launch of the American missiles. But plaintiff's theory does not attack the president's essential authority to launch the missiles under certain circumstances absent the declaration of war. That issue is not presented in this case, I submit to Your Honor.

It would seem to me that to answer your earlier question, which is, what is a political, question from the standpoint of the Secretary, that as I did say the first standard of Baker vs. Carr here is not cleared by the plaintiff. And the first standard is, have military and diplomatic affairs clearly been referred by the constitution to the executive and the legislature? The answer there is clearly yes, and the answer there also is that the matter of a Launch on Warning Capability is clearly that of a military and diplomatic affairs nature.

THE COURT: Counsel, is it the Government's position in this case that Article 3 does not confer upon the judicial branch the power to decide the question whether the president has made a declaration

of (law) unconstitutionally?

MR. PENROSE: I'm sorry, Your Honor?

THE COURT: This question is presented to an Article 3 court: Has the president unconstitutionally declared war without the approval of Congress? Does Article 3 give the federal judiciary the power to address that constitutional question?

MR. PENROSE: I believe Article 3 gives the court the power to decide whether or not the president is in fact causing the nation to wager war without a declaration by Congress, yes.

THE COURT: And that's because of the judicial branch's power of judicial review, wouldn't you say? That goes back to Marbury versus Madison.

MR. PENROSE: I believe it would, Your Honor.

THE COURT: You're not taking the position that this court has no Article 3 power to decide whether in an actual case or controversy the president is or is not acting in compliance with the constitution?

MR. PENROSE: I'm not saying that this court, presented with the case in controversy with the appropriate facts, that it would not have constitutional authority to decide that issue.

Clifford Johnson,
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Stanford,
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Tel: (415) 723-0167

Plaintiff *pro se*.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Clifford J. Johnson,

Plaintiff,

vs.

General John Chain, Commander In Chief, Strategic Air Command, and his Minuteman/MX chain of command,

Defendants.

No. C 89 2026 5 SW

PLAINTIFF'S DECLARATION

Please notice that none of the legal analysis presented below is direct argument. It recounts my perception of legal cause for seeking the essentially equitable relief of a finding of standing. "I think/thought that" is an often unstated but implied preface.

1. I, Clifford Johnson, am the Plaintiff in the within Complaint In Equity, and I was the Plaintiff in the two related cases described below. If, ultimately, I am not satisfied with the decisions of the lower courts in this litigation, it is my intention to petition the United States Supreme Court for review, and thereafter, if need be, to petition for redress in international courts of justice. Accordingly, I consider it my duty

to exhaust my legal remedies in the lower courts. In good faith, I am filing the Complaint In Equity in the hope that such a petition will not prove necessary, and also in proper fulfillment of this duty. As explained below, I believe that this action fully complies with the prior judgments of this trial court and of the court of appeal.

2. The first related case is *Johnson v. Weinberger*, C-84-0874-SW, filed February 29, 1984. It is not at issue herein, but is noted in order to complete the litigation history. The complaint, which comprises Exhibit C herewith, alleged that the Defendant Secretary of Defense "is developing and has not renounced launch-on-warning-capability [defined therein]," and that any such capability would pose a risk to my life, in violation of my Fifth Amendment due process rights. The complaint also alleged that any such capability would unconstitutionally usurp both the power of Congress to declare war and the power of the President to wage war, and would jeopardize the peace in violation of the United Nations Charter. By order filed July 20, 1984, comprising Exhibit D herewith, the Honorable Spencer Williams, Judge, dismissed the complaint as presenting "a nonjusticiable issue under the political question doctrine." The appeal CA-84-2495 was taken from this decision, but the dismissal was upheld by Memorandum filed November 9, 1985, comprising Exhibit E herewith, on the narrower ground that I had "not alleged that LOWC [launch-on-warning-capability] is even technologically feasible, much less that its use has been adopted as official policy or implemented." Because of this omission, the court of appeal concluded that I had not alleged an injury in fact.

3. The second related case is *Johnson v. Weinberger*, C-86-3334-SW, filed June 17, 1986. The complaint, which comprises Exhibit F herewith, alleged with some particularity that the Defendant Secretary of Defense "is presently operating a LOWC," and that this policy posed a risk to my life in violation of my Fifth Amendment due process rights. The complaint also alleged that this policy

unconstitutionally usurped both the power of Congress to declare war and the power of the President to wage war, and jeopardized the peace in violation of the United Nations Charter. The Defendant moved to dismiss the action, primarily arguing the political question issue. Standing was argued only by the perfunctory incorporation of the pleading in the original case, CA-84-0874-SW. By order filed December 16, 1986, comprising Exhibit G below, the trial court directed me to reply, *emphasizing the political question issue rather than the standing issue*, in a total of at most 10 pages. After this submission in the trial court, there was much further argument *solely* on the political question issue, which notably included the filing of amicus brief by the Bay Area Lawyers' Alliance for Nuclear Arms Control, and which remarkably resulted in the express exclusion from consideration of all acts of Congress and of the Defendant's declaration contesting some of my factual allegations. By order filed June 29, 1987, comprising Exhibit H herewith, the Honorable Spencer Williams, Judge, dismissed the complaint on the ground that:

> Plaintiff's claims present a nonjusticiable political question. The Executive's choice of preparation against the threat of attack or response to an actual attack [are] issues which the will of the judiciary cannot broach.

The appeal CA-87-2566 was taken from this decision. Of course, only the political question issue was challenged in the 21-page Appellant's Opening Brief, filed November 2, 1987. In the 17-page Reply Brief filed December, 1987, the Defendant requested de novo review, so as to add a 2-page argument attacking my standing. This was answered by a 3-page argument in my 13-page Reply Brief, filed January, 1988, made in the trial court.

4. On May 13, 1988, I attended the hearing of this appeal by a panel of three justices of the Ninth Circuit Court of Appeal. In due course, I requested a copy of the transcript of the hearing by mailing the appropriate form, which comprises Exhibit I

herewith. The form (and my payment) were returned by the clerk with the overtyped information that no transcript was available. Accordingly, I telephoned the court to ask when the transcript might be available, or whether I should regard the loss as permanent, which I was told to do. (I apologize for hand-written annotations on Exhibit I re this conversation.) Accordingly, I must hereby state my pertinent, albeit admittedly less than perfect, recollections of the vital hearing. Sitting immediately behind my counsel, William Brockett and Thomas Robertson of the Bay Area Lawyers' Alliance for Nuclear Arms Control, I was able to hear the proceedings without difficulty.

5. The court granted each party only 15 minutes of oral argument, rather than the alternative of 30 minutes each. My counsel elected to use about 10 minutes of this time in his opening speech, reserving about 5 minutes for his reply, and he naturally devoted most of his time to the political question issue. However, he was interrupted at an early moment by one justice who stated the opinion that a congressman would certainly have standing to bring the action because his right to declare war was at stake, but that I lacked standing to sue because I could vote for or petition a congressman, which was an adequate alternative due process recourse. *This was the first time this argument had ever been made against my standing.* My counsel responded by pointing out that I was not suing to have an abstract right enforced, but to save my very own life. Then he returned to the political question issue, which he stated that he understood to be the major concern. The court did not contradict this stated understanding. After his opening argument, I passed a note to my counsel asking him to inform the court that I could not vote, but he signaled that lack of time would preclude this new fact. During my counsel's reply, a different justice stated his opinion that I lacked standing because I could vote for the President. With little time left, my counsel informed the court that if standing was a serious objection, in fairness

to me it had to be thoroughly reargued in the trial court, for I wished to introduce a number of further facts to establish my standing and to rebut the new concerns, which was not proper on appeal, nor was there sufficient time to do so at the hearing even it were allowed. In moving on, my counsel cited, as one example of such further unalleged facts, only that the risk to my life was demonstrably higher than the risks to the lives of many others, owing to my location near to manifestly top-priority nuclear targets. The court did not comment on this submission.

6. On June 27, 1988, the court of appeal filed a published opinion (hereafter "the opinion"), comprising Exhibit J herewith, which unanimously affirmed dismissal on the sole ground that I lacked standing, without reaching the political question issue. Although the opinion did not in so many words state the mistaken ground that my ability to vote and to petition my congressman was sufficient due process recourse, it strongly suggested that this was a consideration, in that it concluded that I should "most appropriately" address my challenge to "the *representative* branches of the federal government. [Citations.]" (Emphasis added.) This point was made immediately prior to drawing the conclusion re lack of standing, and so it appears to have been an important consideration. Whether this consideration mistakenly presumed my right to vote is not wholly clear, but the citations provided did base their findings on citizen case-law. Specifically, in making the point re the representative branches, the later two of the three cases which were cited in the opinion relied upon the earliest case, namely, *Warth v. Seldin*, (1974) 422 U.S. 490, which concerned the injury of "citizens" (at 490). In any case, I am aware of no judicial determination re the standing of parties who lack representative due process recourse. I reasonably contend that this lack in this case could establish a *prima facie* cause of action under the Fifth Amendment, according to the straightforward standard deemed *prima facie* conclusive in *Rainbow Val. Citrus Corp. v. Federal Crop Ins. Corp.*, C.A.Ariz.1974, 506 F.2d 467. Indeed, it

appears to me that to rule otherwise would manifestly contradict the well-established principle that ordinary Fifth Amendment due process protections may be claimed in court by resident aliens (and even claimed by illegal aliens) when it is alleged that government agents are not "acting within the scope of their delegated powers"; *Jean v. Nelson*, C.A.Fla.1984, 727 F.2d 957, rhrg. den. 733 F.2d 908, aff'd 105 S.Ct. 2992. Of course, under the Fifth Amendment, the right to life is protected, under the "strictest standards of scrutiny," against unlawful takings. *Landrum v. Moats*, C.A.Neb.1978, 576 F.2d 1320, cert.den. 439 U.S. 912.

7. Besides not addressing the fact that I had no due process remedy through the representative branches, the opinion does not address the possible new allegation of higher-than-average risk due to my location close to top-priority targets. Remarkably, in noting that regional residence and concomitant variation of degree of risk could confer standing, and in stating flatly that "[s]imilar indicia are not present here," the court of appeal outright excluded this fact from actual consideration, but indicated that it could be sufficient. In addition, the opinion noted that *objective*, as opposed to emotional, mental discomfiture, such as "aesthetic" displeasure, was sufficient for standing. This provides yet another type of new fact that could be added to the allegations in order to secure my standing: having an Operations Research qualification, I am particularly and *objectively*, as opposed to emotionally and subjectively, displeased and apprehensive.

8. *Most importantly*, the opinion contains one new ground for lack of standing, namely: "Inferences concerning the uncertain and indefinite effects of the nation's strategic defense policy are, at best, speculative." Accordingly, the risk I had alleged was deemed "hypothetical." This characterized the alleged injury at the outset of the opinion, and so it may well be the case that the subsequent conclusions re lack of particularity of injury were at root due to this "speculative" attribution. Thus,

correcting the "speculative" quality might well correct the non-particularity objection. The Proposed Complaint specifies three distinct types of risk, differing in matters of fact, and not hypothetically. The opinion's "speculative" characterization surprised me. It was a novel ruling, and at the hearing the entire discussion on standing had seemingly assumed the existence of a more or less mechanical risk to my life. Indeed, since the risk was alleged to be "clear and present," before the opinion issued I had thought that such a nonspeculative risk was necessarily taken as a true fact for the purposes of an appeal from dismissal as a matter of law, rather than by summary judgment. How, then, had the injury of risk become "speculative," so that the court of appeal could regard is it as a "mere interest in a problem," rather than as an immediate threat to my very life, which I had alleged?

9. Upon research, I discovered that the speculative characterizaton arose from suing an overly remote Defendant, rather than from a failure to allege a threat of actual harm. Re the "speculative" nature of my allegations, the court of appeal cited only *Simon v. Eastern Kentucky Welfare Rights Organization*, (1976) 426 U.S. 26, 48 L.Ed.2d 450. In that case, the court deemed a challenge to government officials to be "speculative" only because the actual harm that could be done to the Plaintiffs was rather the responsibility of agents of the government, even though their actions were concededly motivated by substantial government rewards or sanctions. The court ruled at 41 that:

> [I]njury at the hands of a hospital [the rewarded agent of the government] is insufficient by itself to establish a case or controversy in the context of this suit, for no hospital is a defendant. The only Defendants are officials of the Department of the Treasury.

The speculative element derived from the length, without fracture, of the causal chain between official government rewards and injury by persons whom the rewards would predictably, and was indeed intended to, motivate. Applied to the facts of my lawsuit,

this indicates that the element of speculation might be overcome by suing the concerned Air Force officers directly, rather than the Secretary of Defense. Further, I knew this possibility found additional support in rulings re standing in "discretionary function" cases, in which standing was granted only against low-level government agents whose actions could not be ruled immune on the ground that applied to higher officials, which was that they exercised "governmental," as opposed to "employee," discretion. See, e.g., *Jackson v. Kelly*, (1977) 557 F2d 735,737-39.

10. This consideration added a fundamentally new basis for jurisdiction, namely, the so-called *Bivens* constitutional tort against the Defendants *as individuals*, rather than as acting in their official capacities. *(Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, (1971) 403 U.S. 388) Viewed in this light, I could accept the wisdom of the "speculative" characterization, in that the military activities at issue herein are not under the accountable control of the Secretary of Defense, who, it is published, does not review the Joint Strategic Capabilities Plan at all, and who reviews only summaries *generated by the military* of the Single Integrated Operational Plan. These plans feature in the Proposed Complaint at paragraphs 9-12,49. *I realized that the opinion gave no indication that a military officer could escape a suit based on allegations of intrinsically endangering my life*. On the contrary, all the court of appeal's citations tended to confirm that such allegations would sustain standing, e.g. "actual present or immediately threatened [personal] injury resulting from unlawful governmental action," let alone from unlawful nongovernmental action, was taken as a hallmark of sufficient injury in *Allen v. Wright* (1983) 468 U.S. 737,760. Reasonably, I thought myself free to reframe the complaint to make military action, rather than defense policy, the fundamental conduct complained of. In particular, I could name Air Force officers, right down to the missile launch crews, as Defendants, and allege that in robotically following standing orders in the event of a launch order, the

Defendants could not be said to exercise any *governmental* discretion, and that their conduct in agreeing to do this amounted to an inchoate crime, and a crime against the peace.

11. This development of the factual allegations not only concretized my injury, but suggested further and novel grounds for jurisdiction and standing under the guarantee clause, and also under the Martens clause and the Treaty of London. Additionally, the guarantee clause is the basis for the further injury of violation of a constitutional right by the imposition of nonrepublican government. The treaty provisions may grant standing *independent of personal injury to the Plaintiff*, but dependent on new facts. True, standing under these treaties is without precedent that I know of, but then the facts of this case are unprecedented, and the legal *logic*, that acts of Congress can and do grant standing to non-injured parties, is well-established. (The Freedom Of Information Act is a pertinent example.) The public conscience, if it ever could dictate jurisdiction and standing; and Plaintiff's duty to complain of that which he contributes to, if it ever could grant standing and jurisdiction; surely do so in this case, in which the potential damage is beyond human ken, and the Plaintiff has no formal political recourse. In this material respect, Plaintiff's duties and obligations to complain do not differ from those of a full United States citizen, and he must be granted a judicial channel for complaint, since there is no procedural channel outside of court, other than naturalization, which would unfairly require that the Plaintiff renounce his British citizenship.

12. *Allen v. Wright*, *supra*, at 762, noted that confidence in a determination re standing rested on "a properly developed record" on the matter. Accordingly, and in view of the above new and unclosed possibilities, I determined to persist in my litigation, and began to draft a petition for a rehearing in the court of appeal, which would have included an extraordinary motion seeking permission to introduce new

facts, which would have raised standing contentions neither alleged in the complaint nor addressed in the opinion. However, the objection that inferences based on defense "policy" were "at best, speculative" required such a radical revision of factual allegations that I soon realized that this appellate remedy was wholly inadequate, and improper. I was especially guided on this matter by four authorities cited in the opinion, as follows:

> **(a)** In *Sierra Club v. Morton*, (1971) 405 U.S. 727,735, the Supreme Court affirmed dismissal for lack of standing, despite suggesting, *without deciding*, that a trivial factual addition to the complaint (aesthetic harm), could have established standing; wherefore, desirous to avoid further delays in the litigation, I have drafted a very detailed Proposed Complaint, which I hope is factually exhaustive.
>
> **(b)** In *United States v. SCRAP*, (1972) 412 U.S. 669,690, in which the aesthetic harm element was confirmed as sufficient injury for standing, a party suffered the consequences of failing to ask the District Court "to take evidence on the issue of standing," where standing was the main trial court issue.
>
> **(c)** In *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, (1978) 438 U.S. 59,72, 57 L.Ed.2d 595, the "District Judge held four days of hearings on the questions of standing and ripeness [emphasis on standing]; his factual findings form the basis for our analysis."
>
> **(d)** *Warth, supra*, at 501, noted that the capacity of the courts to determine standing rested on (emphasis added)
>
> > the *trial court's* power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing. If, *after this opportunity*, the plaintiff's standing does not adequately appear from all materials on record, the complaint must be dismissed.

I had not had this *trial court* opportunity previously, for the political question issue had been fully argued at the direct expense of the standing issue, as aforesaid. Moreover, a petition for rehearing in the court of appeal could not provide me with adequate opportunity to introduce new facts. Thus, I believe that I am justifiably seeking a full factual record and ruling re standing in the trial court, which is the

express, primary purpose of the present Complaint In Equity.

13. I believe that the Proposed Complaint, which comprises Exhibit A herewith, is fundamentally different from the prior related cases, in that it is against wholly different Defendants, and challenges specific military standing orders and subdelegations, rather than general Department of Defense policy. Although the Proposed Complaint does not rest on this authority, Article 1 of The Hague Convention Respecting the Laws and Customs of War on Land, (1907) 36 Stat. 2277, T.S. No. 539, explicitly requires that the military's standing orders shall be lawful. This at least shows that the lawfulness of military orders are proper objects of judicial scrutiny. Of course, under 10 U.S.C. § 892, which requires obedience only to "lawful" orders, case-law has given rise to well-established standards for assessing the lawfulness of orders. Moreover, the Proposed Complaint challenges preemption, launch on warning, and launch on impact, whereas the prior cases did not include preemption or launch on impact.

14. All the above particularities of injury are included under the topic "Standing" in the Proposed Complaint (paragraphs 62-70). Naturally, in consideration of the court of appeal's prior dismissals for failure to allege facts which there was no meaningful opportunity to introduce, I drafted a lengthy Proposed Complaint which I believe exhausts reasonable factual contentions re standing.

15. It is my opinion that the language of the trial court's political question dismissal, quoted in paragraph 3 above, especially by its use of the word "Executive," which embraces the military, likely applies to the new allegations. Because of this perceived likelihood, even though I believe it would not quite be improper for me to file the Proposed Complaint as an original action, I believe that filing this new action in equity is preferable. I truly respect this court's prior judgment on the political question issue, for its plain language.

VERIFICATION

I hereby declare under penalty of perjury that the foregoing Complaint In Equity and this Declaration concerning it are true and correct, based upon my personal knowledge, and upon my information and belief.

SIGNED C. Johnson DATED 7/3/89

Clifford Johnson,
Plaintiff *pro se*.

Clifford J. Johnson,
Spruce Hall,
Stanford,
CA 94305.
Tel: (415) 497-0167

Plaintiff in pro per.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Clifford J. Johnson,

Plaintiff,

vs.

Secretary of Defense Caspar Weinberger,

Defendant.

NO. C 84 0874 SW

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff complains and alleges:

1. JURISDICTION. The action arises under the Constitution of the United States at Article I, Section 8, Clause 11, which provides that "The Congress shall have Power ... To declare War"; and at Article 2, Section 2, Clause 1, which provides that "The President shall be Commander in Chief" of the Armed Forces. The action also arises under the United Nations Charter (1946) at Article 2, Part 3, which binds the United States to settle disputes "in such a manner that international peace and security, and justice, are not endangered"; and under the North Atlantic Treaty (1949) at Article 1, which reaffirms the same binding provision. The action also arises under 42 U.S.C. Section 4332 (A) and (B), which require systematic and scientific decisionmaking regarding actions which may impact man's environment.

2. Plaintiff is a permanent taxpaying resident of San Francisco, California.

3. Herein, "launch-on-warning-capability" is defined to be any set of procedures whereby the retaliatory launching of nuclear missiles may occur both in response to an electronically generated warning of attacking missiles and prior to the conclusively confirmed commencement of hostilities with any State presumed responsible for said attack.

4. Defendant, separately and in collaboration with North Atlantic Treaty partners, is developing and has not renounced launch-on-warning-capability.

5. Launch-on-warning-capability now requires a response time so short as to preclude the meaningful intercession of human judgment by the President or by his agents.

6. The essentially autonomous character of launch-on-warning-capability creates a substantial probability of accidental nuclear war due to computer related error.

7. Said probability substantially surrenders both the power of Congress to declare war and the ability of the President to command the Armed Forces, and launch-on-warning-capability is therefore doubly repugnant to the Constitution.

8. Said probability gravely endangers international peace and security, and therefore a launch-on-warning-capability violates both the United Nations Charter and the North Atlantic Treaty.

9. Said probability constitutes a grave threat to the environment of man, and so a launch-on-warning-capability is prohibited by virtue of the systematic and scientific regard required by 42 U.S.C. Section 4332 (A) and (B).

10. The life and property of Plaintiff are gravely jeopardized by Defendant's development of and failure to renounce a launch-on-warning-capability.

WHEREFORE, Plaintiff prays that this court:

(i) declare that the implementation of a launch-on-warning-capability is unconstitutional and in violation of the United Nations Charter and of the North Atlantic Treaty and of 42 U.S.C. Section 4332;

(ii) enjoin Defendant to renounce the implementation of a launch-on-warning-capability;

(iii) award Plaintiff the costs of this case and such other and further relief as this court deems fit and proper.

SIGNED Clifford Johnson
Clifford Johnson,
Plaintiff in pro per.

DATED 3/23/84

FILED

JUL 20 5 13 PM '84

WILLIAM L. WHITTAKER
CLERK
U.S. DISTRICT COURT
NO. DIST. OF CA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CLIFFORD J. JOHNSON,

Plaintiff,

SECRETARY OF STATE CASPAR WEINBERGER,

Defendant.

No. C-84-0874-SW

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

IT IS ORDERED that the above entitled action be dismissed. This order is pursuant to Rule 41 (b) of the Federal Rules of Civil Procedure.

Plaintiff, appearing in pro per., brought this action against Secretary of State Weinberger, seeking declaratory relief regarding an alleged launch-on-warning-capability for nuclear defense missiles.

After consideration of all exhibits, moving and responding papers, briefs and oral arguments, it appears, and the court finds, that Plaintiff raises a nonjusticiable issue under the political question doctrine, and that Defendant's motion to dismiss, as a matter of law, must be granted.

IT IS SO ORDERED.

Dated:

UNITED STATES DISTRICT JUDGE

Exhibit D: Trial court dismissal of case C-84-0874-SW -93-

Not For Publication

FILED

NOV 19 1985

CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLIFFORD J. JOHNSON,

Plaintiff/Appellant,

v.

CASPER WEINBERGER, Secretary of Defense,

Defendant/Appellee.

No. 84-2495
DC No. C-84-0874 SW

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Hon. Spencer Williams, U.S. District Judge, Presiding

Argued and Submitted July 10, 1985-San Francisco, California

Before: FERGUSON, NORRIS, and WIGGINS, Circuit Judges

Plaintiff and appellant is Clifford Johnson. Defendant and appellee is Caspar Weinberger in his official capacity as Secretary of Defense. In his complaint, Johnson sought a declaration that implementation of launch-on-warning capability (LOWC) was unconstitutional, in violation of the United Nations Charter, and contrary to statute. The district court dismissed the action.

Plaintiff Johnson has alleged, "Defendant, separately and in collaboration with North Atlantic Treaty partners, is developing and has not renounced launch-on-warning capability." Amended Complaint for Declaratory and Injunctive Relief at 3.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

He has not alleged that LOWC is even technologically feasible, much less that its use has been adopted as official policy or implemented. The various injuries and constitutional and statutory violations alleged in the complaint could occur only if LOWC were eventually developed and implemented. Johnson alleges no injury or constitutional or statutory violation from the development of or failure to renounce LOWC per se. Therefore, no case or controversy was before the district court. Johnson has essentially asked for an advisory opinion. "As is well known, the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues, 'concrete legal issues, presented in actual cases, not abstractions,' are requisite. This is as true of declaratory judgments as any other field." United Public Workers v. Mitchell, 330 U.S. 75, 89 (1947) (footnotes omitted).

Because the district court lacked subject-matter jurisdiction over this action, the judgment dismissing the action is AFFIRMED.

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FILED
JUN 17 1986
WILLIAM L. WHITTAKER
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Clifford J. Johnson,
Spruce Hall,
Stanford,
CA 94305.
Tel: (415) 723-0167

Plaintiff *in propria persona.*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

C 86 3334 EFL

Clifford J. Johnson,

Plaintiff,

vs.

Secretary of Defense Caspar Weinberger,

Defendant.

No.

VERIFIED COMPLAINT FOR DECLARATORY RELIEF (28 U.S.C. Section 2201 and F.R. Civil P. Section 57)

Plaintiff complains and generally alleges:

FIRST COUNT

(DEFENDANT'S LAUNCH ON WARNING CAPABILITY VIOLATES PLAINTIFF'S FIFTH AMENDMENT DUE PROCESS RIGHTS)

1. *JURISDICTION:* To reduce a peacetime threat to his life, Plaintiff invokes the jurisdiction of this court under the Constitution of the United States at Article III, Section 2, Clause 1, which mandates that "The judicial power shall extend to all Cases ... arising under this Constitution, the Laws of the United States, and Treaties ...; to controversies to which the United States shall be a party"; and under the Fifth Amendment to the Constitution, which mandates that, by acts of the federal government, "no person shall be deprived of life, liberty, or property without due process of law"; and under 28 U.S.C. Section 2201 and F.R. Civil P. Section 57, which provide for declaratory relief; and under 28 U.S.C. Sections 1331, 1346, and 1350, which provide for tort actions against the government.

2. Plaintiff is a British resident of San Francisco, California. He is employed as a computer professional by Stanford University, California, and has a doctorate in operations research from Sussex University, England.

3. Plaintiff brings suit against the Secretary of Defense acting in his official capacity, wherein he is obligated by oath and under the Constitution of the United States at Article II, Section 1, Clause 8, and Section 3 to faithfully execute the laws and to preserve, protect, and defend the Constitution.

4. A "Launch On Warning Capability", hereinafter a "LOWC", is defined to be any set of procedures whereby the retaliatory launch of nonrecoverable nuclear missiles may be committed in response to a valid tactical (in-flight) warning of attacking Soviet missiles and prior to the unequivocal confirmation of a detonation of an attacking Soviet missile to the direct injury of the United States or its allies. In the foregoing, a launch is deemed "committed" either when orders to execute the launch are issued, or when orders are issued making launch execution contingent upon imminent electronic communications failure(s).

5. There is public concern that there exists a "window of vulnerability" to surprise "decapitation" and "disarming" nuclear strikes, and that economic and technical limitations have resulted in an undue default reliance upon a LOWC by the United States. Academically, it has been demonstrated, and in Congressional testimony asserted, that: (a) within fifteen minutes of the first missile emerging from the ocean, a normal patrol of Soviet nuclear attack submarines could nullify the capacity of the United States to command and control a nuclear retaliation, and, if the attack were a surprise, also destroy the United States nuclear bomber fleet; and (b) all MX and Minuteman missiles, thereby isolated, could be destroyed in their silos within a further twenty minutes by simultaneously launched Soviet inter-continental ballistic missiles.

6. Defendant is presently operating a LOWC which for warning depends upon error-prone computerized "declaration" of missile attack, and which perforce

executes so briefly that under no circumstances could any such declaration be unequivocally verified prior to making the retaliatory launch commitment; wherefore the executive is, *de jure* (as set forth in these eight separate counts), incompetent to make said commitment. *De facto,* said commitment is: **(a)** forced by a first priority mission to get a so-called "Emergency Action Message" out before the detonation of any attacking warhead; **(b)** preprogrammed into a promiscuous complex of platforms, sensors, radars, computers, displays, alarms, outrageous menus of nuclear options, blatantly reflexive decisionmaking drills, exotic command, control, and communications systems, and designated missiles held on hair-trigger alert and primed for launch on warning; and **(c)** ultimately effected mechanically or by launch control officers according to mandatory procedures for verifying and then keying launch instruction codes into missile computers in such a fashion that a mistaken entry could, for example, cause Moscow to be obliterated instead of a remote oil refinery. Defendant's LOWC is essentially automatic (predecided), being tended by Defendant's agents rather than decisionally manned by the President or by his constitutionally authorized civilian successor.

7. This unprecedented complex cannot be operationally tested end-to-end and is at all times prone to generate spurious declarations of missile attack due to computer-related error. Such warnings, not only but especially in a nuclear alert, are liable to cause the executive to speciously commit the launch of volleys of nuclear missiles under the control of an ever-ready targeting and sequencing program developed and implemented particularly to provide for a LOWC. Thus, there is a continuous risk of massive accidental launch, hereinafter "said risk". Clearly, these circumstances indicate an imminent involvement in hostilities.

8. Defendant contends: **(a)** alarmingly, that "We can never neglect the risk of a surprise attack 'out of the blue'";[1] **(b)** plausibly, that his operation of a LOWC

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[1] *Annual Report to Congress, FY83* p.I-19.

would effectively deter a surprise Soviet missile attack and guarantees that MX and Minuteman missiles are not "sitting ducks";[2] (c) recklessly, that an accidental launch is impossible; and (d) incorrectly, that the operation of a LOWC is an executive prerogative and that whether this is so is a wholly political question.

9. The launch of volleys of nonrecoverable nuclear missiles at Soviet targets gives rise to a likelihood of a nuclear counterstrike and global environmental damage, in which the Plaintiff's life and property would be destroyed. Thus, said risk is a clear and present threat to Plaintiff's life and property, which *per se:* (a) secures Plaintiff's standing to bring this action under the due process clause of the Fifth Amendment, in that it constitutes an anticipatory deprivation without a possibility of just compensation; and (b) gives rise to a tort action as set forth in the *Restatement (2nd) of Torts* (1965) at p.282-291.

Plaintiff further and separately alleges:

SECOND COUNT

(DEFENDANT'S LOWC NOW USURPS THE POWER OF CONGRESS TO COMMENCE WAR)

10. The second count arises under the Constitution of the United States at Article I, Section 8, which mandates that "The Congress shall have Power ... To declare War". Particularly, at P.L. 93-148, 88 Stat. 555,[3] the Congress resolved that: "The constitutional powers of the President as Commander-in-Chief to introduce the United States Armed Forces into ... situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national

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[2] *Department of Defense Authorization for Appropriations for Fiscal Year 1986,* Hearings before the Senate Committee on Armed Services, 99 Cong. 1 sess. (GPO, 1985), pt.2 pp.1164-5.

[3] War Powers Resolution (1973); bicameral passage over Presidential veto; enacted expressly "Under Article I, Section 8, of the Constitution (which specifically provides) that the Congress shall have the power to make all laws necessary and proper for carrying into execution not only its own powers but also all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof".

emergency created by attack"; and "Authority to introduce United States Armed Forces into ... situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred— from (1) any provision of law ..., including any provision contained in any appropriation act, ... or (2) from any treaty".

11. Congress has not declared war on the Soviet Union, a LOWC is not provided for by statute or treaty, and the Soviet Union has not attacked. Therefore, Defendant's present operation of a LOWC usurps the power of Congress to commence war, and so is unconstitutional.

THIRD COUNT

(NOTWITHSTANDING CRISIS, UNILATERAL PRESIDENTIAL FIRST-USE USURPS THE POWER OF CONGRESS TO QUALITATIVELY EXPAND WAR, AND A LOWC IS A FIRST-USE)

12. The third count arises under the Constitution of the United States at Article I, Section 8, which mandates that "The Congress shall have Power ... To declare War, grant letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water ... To make rules for the Government and regulation of the land and naval forces ... To provide for calling forth the Militia to ... repel Invasions".

13. Herein, a "first-use" is defined to be the execution by Defendant, prior to the direct injury of the United States or its allies by a nuclear detonation, of any set of procedures accomplishing or threatening by imminent accident the injury of the Soviet Union or its allies by nuclear detonations.

14. Defendant's LOWC is a first-use.

15. Defendant contends that first-use is within the scope of the President's unilateral power to commit the United States Armed Forces to combat in a crisis.

16. First-use now gives rise to an imminent danger of unlimited nuclear war and global calamity, and therefore constitutes a qualitative expansion of war which only the Congress can authorize.

17. Defendant's present operation of a LOWC usurps the power of Congress to qualitatively expand war, and so is unconstitutional.

FOURTH COUNT

(DEFENDANT'S LOWC DELEGATES A STATUTORY PRESIDENTIAL DUTY IN VIOLATION OF THE SUBDELEGATION ACT)

18. The fourth count arises under 42 U.S.C. Sections 2121 and 2122 (Atomic Energy Act, 1954) which provide that "The President from time to time may direct" the delivery of "atomic weapons to the Department of Defense for such use as he deems necessary in the interests of national defense", and that no other use of atomic weapons is permitted; and under 3 U.S.C. Section 301 (Subdelegation Act, 1951), which mandates that "any function which is vested in the President by law" shall be delegated only to officials "required to be appointed by and with the advice and consent of the Senate", and that such delegation "shall be in writing" and "shall be published in the Federal Register".

19. Defendant's LOWC perforce executes so briefly that the retaliatory launch decision, under prescribed and expected attack scenarios, will be taken by military commanders and without Presidential order.

20. Defendant has not published in the Federal Register a list of those military commanders to whom authority for a nuclear launch has been so delegated.

21. Defendant's LOWC delegates the President's vested power to order the use of nuclear weapons in violation of 3 U.S.C. Section 301.

FIFTH COUNT

(DEFENDANT'S LOWC ABDICATES THE POWER OF THE COMMANDER IN CHIEF, AND SUBJECTS EVERY STATE IN THE UNION TO NON-REPUBLICAN GOVERNMENT)

22. The fifth count arises under the Constitution of the United States at Article II, Section II, Clause 1, which mandates that "The President shall be Commander in Chief" of the Armed Forces, and at Article IV, Section IV, Clause 1, which mandates that "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion".

23. Said risk fundamentally abdicates the discretionary responsibility of the Commander in Chief as protector from invasion, and substantially subjects every State in the Union to non-republican government, and is thus doubly repugnant to the Constitution of the United States.

SIXTH COUNT

(DEFENDANT'S LOWC IS AN UNREPORTED THREAT TO MAN'S ENVIRONMENT, AND SO IS PROHIBITED BY THE NATIONAL ENVIRONMENTAL PROTECTION ACT)

24. The sixth count arises under 42 U.S.C. Section 4332 (National Environmental Protection Act, 1970), which requires systematic and scientific decisionmaking, and public report, regarding actions which may impact man's environment.

25. Said risk constitutes a grave threat to the environment of man, and so a LOWC is prohibited by virtue of the systematic and scientific regard required by 42 U.S.C. Section 4332, subsections (a) and (b), which are now part of the law of the land. nor has Defendant published an environmental impact statement on his LOWC, as required by 42 U.S.C. Section 4332, subsection (c).

SEVENTH COUNT

(DEFENDANT'S LOWC JEOPARDIZES PRESENT PEACE, AND SO IS PROHIBITED BY THE CHARTER OF THE UNITED NATIONS AND BY THE NORTH ATLANTIC TREATY)

26. The seventh count arises under the United Nations Charter (1946) at Article 2, Part 3, which binds the United States to settle peacetime disputes "in such a manner that international peace and security, and justice, are not endangered", and under the North Atlantic Treaty (1949) at Article 1, which reaffirms the same binding provision.

27. Said risk gravely endangers international peace and security, and therefore a LOWC violates both the United Nations Charter and the North Atlantic Treaty, which are currently and constitutionally in effect.

EIGHTH COUNT

(DEFENDANT'S LOWC IS A FIRST ACT OF WAR, AND SO IS BANNED BY THE LAW OF NATIONS)

28. The eighth count arises under the law of nations, which prohibits first acts of war, and which is a part of the law of the land under the Constitution of the United States at Article VI, Clause 2.

29. Defendant's LOWC operates as a first act of war.

PRAYER

WHEREFORE, that an actual threat to Plaintiff's life and property be diminished, Plaintiff prays this court declare that Defendant's LOWC—

For the First Count: —constitutes a threat of harm and an anticipatory deprivation without just compensation, in tortious violation of the Plaintiff's due process rights under the Fifth Amendment to the Constitution.

For the Second Count: —now usurps the power of Congress to commence war, and so is unconstitutional.

For the Third Count: —is a first-use, and, first-use being in excess of the President's unilateral authority to commit United States Armed Forces even in a crisis, is therefore unconstitutional.

For the Fourth Count: —under the Subdelegation Act illegally delegates a decisionmaking duty vested in the President by the Atomic Energy Act.

For the Fifth Count: —abdicates the power of the Commander in Chief, and subjects every state in the union to non-republican government, and so is absolutely unconstitutional.

For the Sixth Count: —is an unreported threat to man's environment and is based on unscientifically superficial decisionmaking procedures, and so is prohibited by the National Environmental Protection Act.

For the Seventh Count: —jeopardizes present peace, and so is prohibited by the Charter of the United Nations and by the North Atlantic Treaty, which are now part of the law of the land;

For the Eighth Count: —operates as a first act of war, and so is banned by international law, which is a part of the law of the land.

Plaintiff further prays for each count separately that this court declare that Defendant's constitutionally mandated duty to faithfully execute the laws and to preserve, protect, and defend the Constitution accordingly obligates him to forthwith cease and desist from operating his LOWC; and for such other relief as this court deems fit and proper.

VERIFICATION

Having researched the matter, Plaintiff hereby declares under penalty of perjury that the foregoing is true and correct based upon his information and belief.

SIGNED C. Johnson DATED 6/17/87

Clifford Johnson,
Plaintiff *in propria persona.*

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CLIFFORD J. JOHNSON, Plaintiff, vs. CASPER WEINBERGER, Secretary of Defense, Defendant.	No. C-86-3334 EFL ORDER

Currently before this Court is defendant's motion to dismiss. In its Reply brief, defendant for the first time argues that this complaint should be dismissed on the grounds that plaintiff lacks standing to bring this action and also because the issues raised by plaintiff are nonjusticiable political questions. Because plaintiff has not had the opportunity to address these issues before this Court, it is HEREBY ORDERED that:

1. Plaintiff should file with this Court a ten-page Opposition brief discussing the standing and political question issues, with emphasis on the latter, by 5 p.m. on Monday, January 5, 1987.

2. Defendant can file a Reply brief, no longer than ten pages in length, by 5 p.m. on Monday, January 12, 1987.

3. Oral argument on this motion will be continued until January 30, 1987, at 10 a.m. No oral argument will be heard on Friday, December 19, 1986.

IT IS SO ORDERED.

DATED: December 16, 1986.

EUGENE F. LYNCH
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CLIFFORD J. JOHNSON, Plaintiff, v. SECRETARY OF DEFENSE, CASPAR WEINBERGER. Defendant.	No. C-86-3334 SW ORDER DENYING MOTION TO SET ASIDE DISMISSAL AND MOTION TO AMEND ORDER

This court filed an Opinion and Order Granting the Motion of Defendant to Dismiss plaintiff's complaint on April 28, 1987. The plaintiff then moved this court to set aside the dismissal order or in the alternative to amend it. Those motions came on for hearing before the court on June 17, 1987.

Having read and considered the papers presented by counsel for both parties, as well as the amicus curiae brief, and having considered oral argument from both parties, this court determines that the dismissal order of April 28, 1987 properly concludes that the plaintiff's claims present a nonjusticiable political question. The Executive's choice of preparation against the threat of attack or response to an actual attack touch upon several of the criteria enumerated in Baker v. Carr, 369 U.S. 186

(1962). As such, the plaintiff's concerns fall squarely into the matters of basic national policy, issues which the will of the judiciary cannot broach. The plaintiff's complaint is not reviewable by this court, and his motion to reconsider is DENIED.

In addition, this court refuses to alter the language of its April 28, 1987 order. It accurately explicates the holding that plaintiff raises a nonjusticiable political question. Plaintiff's alternative motion to amend the opinion is DENIED.

IT IS SO ORDERED.

DATED: 6/29/87

Spencer Williams
UNITED STATES DISTRICT JUDGE

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOTICE

PREPAYMENT OF $15.00 IS REQUIRED.

I would like to request a copy of the following oral argument tape:

Case Name: JOHNSON V. WEINBERGER

Docket # : 87-2566

Date Argued: MAY 13, 1988

_____ Please send regular mail to the address of:

_____

_____

_____ Pick up: date _____ time ____:_____.

_____ Please federal express; my account number is _____ and my street address is written above.

_____ Check for $15.00 enclosed.

XXX other: THE ORAL ARGUMENT TAPE OF THIS CASE IS UNAVAILABLE . ENCLOSED YOU WILL FIND YOUR MONEY ORDER.

MAKE ALL CHECKS PAYABLE TO THE CLERK OF COURT.

WHY? WILL IT BECOME AVAILABLE? DISREGARD.

TAPE WAS TAKEN WITHOUT AUTHORIZATION AND NOT RETURNED. NEW PROCEDURES NOW IN EFFECT

Exhibit I: Court of appeal transcript form

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CLIFFORD J. JOHNSON,
Plaintiff-Appellant,

v.

SECRETARY OF DEFENSE CASPAR WEINBERGER,
Defendant-Appellee.

No. 87-2566
D.C. No. CV-86-3334-SW
OPINION

Appeal from the United States District Court
for the Northern District of California
Spencer M. Williams, District Judge, Presiding

Argued and Submitted
May 13, 1988—San Francisco, California

Filed June 27, 1988

Before: Harry Pregerson, Robert Boochever and Robert R. Beezer, Circuit Judges.

Opinion by Judge Beezer

SUMMARY

Constitutional Law

Appeal from dismissal as a nonjusticiable political question. The court affirmed holding that standing is n[t found when speculative inferences are necessary to establish either injury or the connection between the alleged injury and the act challenged.

Appellant Clifford Johnson alleges that the implementation of Launch on Warning (LOW) is unconstitutional. He asserts that LOW relies on error-prone computers, thus increasing the likelihood that nuclear missiles will be launched prior to human identification of a nuclear attack. He asserts that LOW deprives him of due process and deprives the President and Congress of their constitutional prerogatives regarding commencement and conduct of war. The district court dismissed the action as a nonjusticiable political question.

[1] Article III, Section 2 restricts adjudication in federal courts to "Cases" and "Controversies." **[2]** When speculative inferences are necessary to establish either injury of the connection between the alleged injury and the act challenged, standing will not be found. **[3]** Inferences concerning the uncertain and indefinite effects of the nation's strategic defense policy are speculative. **[4]** Nor does Johnson's alleged "computer expertise" establish standing.

COUNSEL

Thomas A. Robertson and William A. Brockett, Keker & Brockett, San Francisco, California, for the plaintiff-appellant.

Richard A. Olderman and Robert Greenspan, Civil Division, Washington, D.C., for the defendant-appellee.

OPINION

BEEZER, Circuit Judge:

Appellant, a resident of California, alleges that the implementation of United States strategic defense policy, specifically Launch on Warning ("LOW"),[1] is unconstitutional.

[1]Appellant defines LOW as

> a set of procedures whereby the retaliatory launch of nonrecover-

Appellant asserts that LOW relies on "error-prone[d]" computers for its implementation, thus increasing the likelihood that nuclear missiles will be launched prior to a positive, human identification of a nuclear attack on the United States. He asserts that LOW deprives him of due process and that LOW deprives the President and Congress of their constitutional prerogatives regarding commencement and conduct of war.

I

Appellant alleges that implementation of LOW threatens his life and property without just compensation, thus violating his Fifth Amendment right to due process. He asserts that LOW "usurps Congress' power to declare war,"[2] and the power of the President to order nuclear weapons.[3]

The district court had jurisdiction under 28 U.S.C. § 1331 (1982). On April 29, 1987, the district court dismissed the action as a nonjusticiable political question. A motion to alter or amend judgment was denied on June 17, 1986. Appeal is timely taken and we have jurisdiction under 28 U.S.C. § 1291 (1982).

---

able nuclear missiles may be committed in response to a valid tactical (in-flight) warning of attacking Soviet missiles and prior to the unequivocal confirmation of a detonation of an attacking Soviet missile to the direct injury of the United States or its allies.

Complaint at 2.

[2]United States Constitution, art. I, § 8 states : "The Congress shall have the Power to . . . declare War . . . [and] To raise and support Armies . . . [and] To . . . repel Invasions."

[3]Additionally, appellant claims in a footnote, without elaboration, that LOW violates the National Environmental Policy Act, 42 U.S.C. § 4322 (1982), and that LOW contravenes the United Nations Charter by "jeopardiz[ing] world peace." Because these issues are not specifically and distinctly argued in his brief, we do not address them on appeal. *Miller v. Fairchild Indus.*, 797 F.2d 727, 738 (9th Cir. 1986).

II

Appellant argues, citing *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74 (1978) and *Forelaws On Board v. Johnson*, 743 F.2d 677, 680 (9th Cir. 1984), *cert. denied*, 106 S. Ct. 3293 (1986), that the "threat" of "injury" from nuclear retaliation, allegedly heightened by LOW, is sufficiently adverse to establish standing.

[1] The standing requirement derives from Article III, Section 2 of the United States Constitution. That provision restricts adjudication in federal courts to "Cases" and to "Controversies." *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982).

[3] A "Case" or "Controversy" will be found when one party demonstrates that it has suffered injury-in-fact which "fairly can be traced" to acts or omissions of the second party, *Simon v. Eastern Kentucky Welfare Rights Organ.*, 426 U.S. 26, 41 (1976), and when there is "a 'substantial likelihood' that the relief requested will redress the injury claimed." *Duke Power*, 438 U.S. at 75 n.20. When "[s]peculative inferences" are necessary, however, to establish either injury or the connection between the alleged injury and the act challenged, standing will not be found. *Simon*, 426 U.S. at 45.

[3] Appellant has not put before us a "Case" or "Controversy." Inferences concerning the uncertain and indefinite effects of the nation's strategic defense policy are, at best, speculative. Such allegations fail to establish standing. *See Simon*, 426 U.S. at 42-43; *Allen v. Wright*, 468 U.S. 737, 758-59 (1984).

[4] Appellant's alleged "computer expertise" does not establish a unique entitlement to standing. His professional insight into the operation of LOW is irrelevant. He must instead demonstrate a personal stake in the outcome of con-

troversy. *No Gwen Alliance of Lane County, Inc. v. Aldridge,* 841 F.2d 946, 949 (9th Cir. 1988); *see also American Jewish Congress v. Vance,* 575 F.2d 939, 943 (D.C. Cir. 1978) ("sheer motivation and commitment to the subject matter of a suit, no matter how strong, cannot substitute for judicially cognizable injury"). "[A] mere 'interest in a problem,' no matter how longstanding the interest and how qualified the [plaintiff] is in evaluating the problem, is not sufficient by itself" to confer standing. *Sierra Club v. Morton,* 405 U.S. 727, 739 (1972); *see American Jewish Congress v. Vance,* 575 F.2d 939, 943 (D.C. Cir. 1978); *Animal Lovers Volunteer Ass'n, Inc. v. Weinberger,* 765 F.2d 937, 939 (9th Cir. 1985).

In *Duke Power,* the Court found " 'injury in fact' " in "several of the 'immediate' [aesthetic and environmental] adverse effects [which] were found to harm appellees," 438 U.S. at 73-74, not in uncertain, hypothetical and unsubstantiated harm.

In *Forelaws,* we identified an immediate risk to "one who lives in or uses . . . [a readily identifiable and confined] area," citing *United States v. SCRAP,* 412 U.S. 669 (1973). We explained that standing to sue the utility rested, in part, upon the fact that plaintiff was "a resident of that [specific] region and a consumer of electric power [produced by the utility] there." 743 F.2d at 680. Similar indicia are not present here.

In short, appellant has alleged only a hypothetical injury and generalized grievance. The hypothetical injury is not "distinct and palpable," *Warth v. Seldin,* 422 U.S. 490, 501 (1975), but "pervasively shared." *Valley Forge,* 454 U.S. at 475, citing *Warth v. Seldin,* 422 U.S. 490, 449-50 (1975). Such challenges are "most appropriately addressed [to] . . . the representative branches [of the federal government]." *Id.*; *see also Allen,* 468 U.S. at 751.

Accordingly, we conclude that appellant lacks standing. Since we conclude that appellant lacks standing, we need not

address the question whether appellant's challenge to LOW and to the implementation of United States strategic defense policy presents a nonjusticiable political question.

AFFIRMED.

Clifford Johnson,
Polya Hall,
Stanford,
CA 94305.
Tel: (415) 723-0167

Plaintiff *pro se*.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Clifford J. Johnson,

Plaintiff,

vs.

Gen. John T. Chain, Commander In Chief, Lt. Gen. Richard A. Burpee, Commander, 1st Lt. Dale Curington, Capt. Derek Avance, 2nd Lt. Steven Bacs, 2nd Lt. Richard Schoonmaker, 2nd Lt. Richard Murphy, Commander Phillip Moore, 2nd Lt. Steven Moore, Col. Edward Burchfield, and all in the Strategic Air Command's chain of command for Minuteman/MX launch,

Defendants.

No. C 89 2026 5 SW

PLAINTIFF'S DECLARATION RE FIRST AMENDED COMPLAINT

I, Clifford Johnson, hereby declare under penalty of perjury, that the following is true and correct, based on my personal knowledge.

1. Pursuant to Local Rule 230-4(b), I sought to confer with the Defendant regarding adding unambiguously described but unnamed Defendants to the complaint filed May 1, 1989. I did this by first leaving a telephone message requesting the name of the government's attorney, which I was promised in a return telephone call, but this I did not receive. Accordingly, on May 24, 1989, I served the Defendant with Plaintiff's First Interrogatory to Discover Defendants' Identities, attached hereto as Exhibit A.

2. On June 26, 1989, I received a telephone call from William Murphy, the United States attorney of record herein. His purpose was to request a stay on discovery pending the disposition of the motion to dismiss. I refused on the ground that the motion to dismiss should be heard after amendment to add the unnamed Defendants. I argued that the court lacked jurisdiction to dismiss the action against them prior to their being named and served, because legal culpabilities pertained to them which did not pertain to the only already named and served Defendant, General Chain. I explained that if the court tried to determine the issues that pertained only to the unnamed and unserved Defendants, that opinion would be mere *dicta*, as the court had no authority to issue advisory opinions without an actual controversy being before it. Indeed, the court of appeal had so ruled in the prior suit (Complaint, Exhibit E, at 95), I observed. I explained that in the event of a dismissal of the complaint against General Chain, it would be necessary and legitimate for me to file a subsequent complaint to obtain a definite determination of the issues pertaining to the unnamed Defendants. Thus it would be expedient for service of the unnamed Defendants to be accomplished prior to the hearing of the Motion to Dismiss, so that all issues could be reached in it. Because of this expediency, I have made the amendments adding Defendants, as described below.

3. William Murphy claimed that the suit could be dismissed regardless of lack of service on the unnamed Defendants, and suggested that my purpose was harassment. I responded by offering to restrict a reply to three individuals representative of the different ranks of command beneath General Chain, including a missile launch crew, to be selected by the Defendant, with advance preparation, in order to minimize the perceived "harassment." William Murphy refused to countenance this offer, and on June 29, 1989, he filed a motion for a protective order staying discovery of the Defendants' identities expressly until after the determination of the Motion to Dismiss filed June 23, 1989.

4. I consider it my duty to bring before the court, as promptly as possible, and preferably before the hearing of the Motion to Dismiss, a sufficiently diverse subset of Defendants from those described in the complaint. Because the Defendant refused to provide me with a minimal three such representative Defendants, I have taken it upon myself to amend the complaint to add several Defendants whose identities I accidentally discovered from the current edition (June 1989) of Air Force magazine, at page 38. I have named more than three Defendants to give the best protection against mistake. I also took the opportunity to add two further facts.

5. The complaint filed herewith is amended as follows. In the Complaint In Equity and in the Proposed Complaint comprising Exhibit A thereto, nine Defendants have been added, by naming them in the titles of the complaints, and by modifying the paragraphs (3 and 7 respectively) describing the Defendants. In addition, a new factual allegation in paragraph 25 of the Proposed Complaint introduces the proposed Rapid Execution And Combat Targeting (REACT) system. This firm proposal helps demonstrate the necessity for judicial action, the ripeness of this action, and the nondiscretionary character of the functions now assigned to launch crews, which will be mechanized. Finally, the Plaintiff's Declaration, comprising Exhibit B to the

Complaint In Equity, is amended at paragraph 1 to assert the additional intent to attempt to have this controversy heard before authoritative international tribunals, if need be. This intention heightens the Plaintiff's duty to establish a complete factual record re standing, which is the necessity warranting this return to the trial court.

SIGNED C. Johnson DATED 7/3/97

Clifford Johnson,
Plaintiff *pro se*.

Clifford Johnson,
Polya Hall,
Stanford,
CA 94305.
Tel: (415) 723-0167

Plaintiff *pro se*.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Clifford J. Johnson,

Plaintiff,

vs.

General John Chain, Commander In Chief, Strategic Air Command, and his Minuteman/MX chain of command,

Defendants.

No. C 89 2026 5 SW

PLAINTIFF'S FIRST INTERROGATORY TO DISCOVER DEFENDANTS' IDENTITIES

(F.R.Civ.Proc., Rule 33)

Requesting Party: Clifford J. Johnson, Plaintiff.

Set Number: ONE

Responding Party: General John T. Chain, Jnr., Defendant.

TO DEFENDANT GENERAL JOHN CHAIN AND HIS ATTORNEYS OF RECORD, PLEASE TAKE NOTICE that Plaintiff Clifford J. Johnson hereby requests that Defendant General John Chain answer the following interrogatory within 30 days from the date of service of this request:

EXHIBIT A

Interrogatory Number One:

The Defendants in this action are defined, in paragraph 3 of the Complaint in Equity for a Finding of Standing, to be

> "all members of the Strategic Air Command's chain of command for accomplishing the launch of Minuteman and MX nuclear missiles. In other words, the Defendants comprise all members of the Strategic Air Command whose responsibilities contingently include issuing or relaying or finally executing orders to launch Minuteman or MX missiles, from the named Commander in Chief [General Chain] down to the crews whose job is to turn the keys that launch the missiles."

Please state the name, rank, military title, and Air Force base address of each and every Defendant.

The above definition expressly construes missile launch crews as exercising command authority, in line with Air Force practice. If you have any doubt as to whether other particular commanders are Defendants, please include them in your response, and state why in each case you do not know whether the chain of command for accomplishing the launch of Minuteman or MX missiles includes that particular commander. If you object to naming some particular commanders, or to providing some of the information requested for particular commanders, please specify both your objections and the number of individuals to which each objection applies, and in all cases please provide all of the requested information that you do not specifically object to providing.

SIGNED _____ DATED 5/23/84

Clifford Johnson,
Plaintiff *pro se*.

EXHIBIT A